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No.

In The
Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF LOUISIANA
Defendant-Appellant,
VERSUS
ROY HRYHORCHUK
Plaintiff-Appellee.

On Appeal from the Supreme Court of Louisiana

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Did the Louisiana District Court and reviewing state appellate courts deprive defendant-appellant of due process and equal protection of the law in this particular case by taking tentative, speculative, and merely-possible factual findings articulated by an appellate court on a previous appeal for the sole and limited purpose of testing and overruling a previously granted motion by defendant-appellant to dismiss at the close of plaintiff's evidence and misapplying such findings to the ultimate merits of the case on remand as though they were final, fully adjudicated findings, for the radically different purpose of ultimately deciding the case, without a full and fair review and analysis of all the evidence in light of the properly applicable procedural and substantive law, when such misapplication of such factual findings occurs in no other like case in Louisiana?

2. Did the Louisiana Supreme Court, the Louisiana Court of Appeal, and the Louisiana District Court deprive defendant-appellant of due process and equal protection of the law by relieving plaintiff-appellee of his burden to prove the elements of his alleged cause of action and placing upon defendant-appellant not merely the burden of going forward with some evidence but rather the entire ultimate burden of both proof and persuasion on the merits, when in all other like cases in Louisiana such burden of proof and persuasion on the merits is always plaintiff-appellee's and never shifts therefrom?

3. Did the Louisiana Supreme Court, the Louisiana Court of Appeal, and the Louisiana District Court vio-

late due process of law and equal protection of the laws in arbitrarily holding that, of two persons in the exact same factual circumstances—i.e., both present and viewing, at the very same time, the very same accident scene and the very same potential hazards thereof—one was negligently liable in failing to foresee, and take steps to prevent, the risk of harm to the other but the other was not contributorily negligent in failing to foresee, and take steps to prevent (e.g., merely walking a few paces out of the foreseeable danger zone) the exact same risk of harm to himself, especially when the substantive law of Louisiana in all other cases at least requires the exact same standards for both negligence liability and contributory negligence bar to recovery?

4. Did the Louisiana Supreme Court, the Louisiana Court of Appeal, and the Louisiana District Court deprive defendant-appellant of due process and equal protection of the law by improperly holding defendant-appellant liable, under the doctrine of *respondeat superior*, for the actions of a person over whom defendant-appellant did not have any power of direction and control nor any other real, factual connexity which would permit a reasonable and non-arbitrary casting of vicarious liability on a faultless defendant-appellant for the fault of another, although such power of direction and control and factual connexity is required for vicarious liability under the doctrine of *respondeat superior* to attach in all other like cases in Louisiana?

5. Did the Louisiana Supreme Court deny defendant-appellant due process and equal protection of the law by allowing judgment to be rendered against

defendant-appellant even though it was not truly a participant nor adequately given notice of the suit at the outset, though such rights are required to be given all other defendants in all other like cases in Louisiana?

6. Did the Louisiana state courts, particularly the appellate courts, deny defendant-appellant due process and equal protection of the law in this particular case by arbitrarily and capriciously casting civil liability on defendant-appellant without a meaningful hearing in a meaningful manner and/or a meaningful appeal, in holding defendant-appellant liable while refusing to acknowledge and address at all several principal issues that were properly raised by defendant-appellant and obviously need to be resolved in order to find defendant-appellant liable in this civil case, a case conceded by the state judiciary to have warranted, under state practice, a non-summarial, full-scope appellate treatment and opinion by the appellate court, when all other defendant-appellants in all other like cases in Louisiana are afforded such rights denied herein?

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is appealed from are as follows: Roy Hryhorchuk, plaintiff-appellee; Travelers Insurance Company, defendant-appellee; Louisiana Department of Transportation and Development, defendant-appellee; State of Louisiana, defendant-appellant; Roy M. Smith, defendant (position taken on appeal unknown); State Farm Automobile Insurance Company, defendant (position taken on appeal unknown); William R. Clifton, defen-

dant (position taken on appeal unknown); and Pennsylvania General Insurance Company, defendant (position taken on appeal unknown).

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The decision of the Louisiana Supreme Court's denial of defendant-appellant's application for writs of certiorari and review (dated June 21, 1982) is reported at 416 So.2d 117 (La., 1982) (App. A, infra). The decision of the Louisiana Court of Appeal for the Third Circuit affirming the district court's decision on remand is reported at 412 So.2d 197 (La. App. 3rd Cir., 1982) (App. B, infra). The judgment on remand and the reasons therefor of the Fourteenth Judicial District Court for the Parish of Calcasieu, dated June 12, 1981, are not officially reported (App. C, infra).

The previous opinion of the Louisiana Supreme Court, affirming in part, reversing in part, and remanding the case back to the district court is reported at 390 So.2d 497 (La., 1980) (App. D, infra). The previous decision by the Louisiana Court of Appeal for the Third Circuit affirming and amending the trial court's judgment is reported at 379 So.2d 281 (La. App. 3rd Cir., 1980) (App. E, infra). The previous judgment and reasons therefor of the Fourteenth Judicial District Court for the Parish of Calcasieu, dated December 29, 1978, are not officially reported (App. F, infra).

JURISDICTION

This is an appeal from the denial of a writ of certiorari and review by the Louisiana Supreme Court on June 2, 1982. No application for rehearing is permitted by Louisiana law. Appellant's notice of appeal to the United States Supreme Court was filed with the Louisiana Supreme Court, the Louisiana Court of Appeal for the Third Circuit, and the Fourteenth Judicial District Court for the Parish of Calcasieu on September 16-17, 1982. This appeal is taken pursuant to 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This appeal involves the constitutionality of the manner in which the Louisiana state courts applied what are otherwise facially-valid, general state constitutional, statutory, and court rule provisions concerning the courts' jurisdiction and procedure and the substantive law applicable to this case. It is the particular activity in

ERRATUM:

On page 2, at the beginning of the third line under caption "JURISDICTION", "June 2, 1982" should

this case of these state courts acting under their generally granted constitutional and statutory powers, but not those state constitutional and statutory provisions themselves on their face, that is alleged to violate the federal constitution. Pertinent state constitutional and statutory provisions that are involved in the context of this case are set forth in Appendix "I" hereof. Their citations are as follows: La. Constitution Article 4, §§5(A) and 8, Article 5, §§5, 10, 16, and Article 12, §10. Louisiana C.C.P. Articles 1265, 1635, 1810(B), 2128, and 2129. La. R.C.C. Articles 453, 2286, and 2320. Louisiana R.S. 13:5107 and 42:1.

Defendant-appellant contends that the actions of the state courts in this case violate the due process and equal protection clauses of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America, to wit:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The overall inquiry presented on this appeal is whether the Louisiana state judiciary, acting pursuant to their judicial function and jurisdiction under the constitution and laws of the state and rules of the state

court, violated the due process and equal protection clauses by the manner in which the state's courts cast civil liability on defendant-appellant in this particular personal injury case.

As a necessary reference to an understanding of the context in which the issues on this appeal arose, an overview of the proceedings below is appropriate. This personal injury case proceeded to trial consolidated with a related insurance coverage declaratory judgment action. Defendant-appellant submits that it had not been properly served per se with notice of the lawsuit and was, for all real, practical purposes, unrepresented by counsel at that time. At the close of plaintiff's presentation of evidence and before any defendant was given the opportunity to present evidence, several defendants (including two agents of defendant-appellant) made and were granted motions to dismiss at the close of plaintiff's evidence. The trial judge continued the trial as to other defendants and found them liable to plaintiff in damages for personal injuries. Plaintiff appealed the summary dismissals (at the close of plaintiff's evidence) as to those defendants (including two agents of defendant-appellant) who were granted such motions to dismiss at the close of plaintiff's evidence, and the defendants who completed their trials and were found liable to plaintiff appealed their judgments. The Louisiana Court of Appeal for the Third Circuit affirmed all judgments as to party liability or non-liability but reduced the quantum of award to plaintiff against those few defendants found liable. The Louisiana Supreme Court granted writs, reinstated the quantum as to those who had been found liable, reversed

the ruling on the motions to dismiss at the close of plaintiff's evidence as to the two agents of defendant-appellant, postulated that defendant-appellant would be liable but in a manner wholly unrelated to and unconnected with and not "through" defendant-appellant's two agents but also conflictingly opined that defendant-appellant had always been a party because it was named through these two agents, even though service of process (notice of the lawsuit) was never properly served on defendant-appellant itself as principal, but only on the two agents, and defendant-appellant was not represented by any counsel attempting to defend defendant-appellant itself. Rather, one of defendant-appellant's agents was represented by counsel for the agent's insurer who took the position that defendant-appellant itself should be held liable directly rather than the insured agency and its insurer. Only after such holding, then informally informed of the Louisiana Supreme Court's opinion, did defendant-appellant's counsel (the attorney general) file an amicus brief on rehearing only. The state's high court denied rehearing. The case was then remanded to complete the trial. Shortly prior to the then remanded continuation of this trial previously begun, plaintiff-appellee at last caused defendant-appellant to be properly served with his petitions and notice of the basis of his claims. Defendant-appellant participated after remand; however, the trial continued from the point of the previous ruling at the close of plaintiff's evidence, and plaintiff-appellee's witnesses, other than plaintiff himself, were not brought back to allow defendant-appellant to cross-examine them. Defendant-appellant did, however, put on witnesses that

had not testified previously and brought out new testimony and evidence that clearly showed key errors in the previous evidence and in the previously postulated factual findings formulated from the plaintiff's evidence alone in the prior trial. However, the state trial and appellate courts sitting below the Louisiana Supreme Court took the factual findings of the state's high court from the prior appeal, which findings were only postulated by the high court as tentative, speculative, merely-possible facts findable only from evidence presented by and favorable to plaintiff for the limited purpose of testing and overruling a motion to dismiss at the close of plaintiff's evidence, and considered them to be some kind of already "determined facts" for purposes of ultimately deciding the case on the merits from all the evidence, refused even to consider and address necessarily adjudicative issues properly raised by defendant-appellant, and, though conceding that the case was one in the class of cases requiring, under state practice, non-summarial, full-scope treatment and opinion and giving lip-service thereto, meaninglessly affirmed the liability of defendant-appellant on the basis of the already "determined facts" from the previous (interlocutory) appeal to the Louisiana Supreme Court (at a time in which defendant-appellant, as explained above, was not really itself a true participant). The Louisiana Supreme Court easily avoided defendant-appellant's issues by simply denying defendant-appellant's writ application (though two of the seven justices voted to grant the writ). From these rulings of the Louisiana state judiciary, defendant-appellant takes this appeal to this Honorable Supreme Court of the United States as the last

resort in the hope that this Honorable Court will order the state's judiciary to give a truly fair and meaningful hearing to defendant-appellant in this case and on the necessarily adjudicative issues defendant-appellant has properly raised in same.

The importance of these events to this appeal are manifold. It must be clearly understood under Louisiana law that sovereign immunity of the state, its separate agencies, and its separate political subdivisions (including parishes [counties] as bodies politic), is waived in state court personal injury suits under a recognized rule that the sued body politic or agency, having, for purposes of such suits, the capacity of a private person per Louisiana Revised Civil Code Art. 453 and other law, must therefore be given the same rights, including constitutional rights, as any other private party litigant (La. Constitution Art. XII, Section 10; *Lewis v. State*, 207 La. 194, 20 So.2d 917 (La., 1945) and *Crain v. State*, 23 So.2d 336 (La. App. 1st Cir., 1945); that, therefore, in such suits every procedure which violates due process and/or equal protection is the same procedure as can be used with respect to any and all other litigants and is a universal violation of due process and/or equal protection; and that the relationship of state (body politic) and state agency (department) is likened, for state lawsuit purposes, to the relationship between principal-in-interest and agent or mandatary, *State v. Texas, Co. et al.*, 199. La. 846, 7 So.2d 161 (1942) and, after remand, 205 La. 517, 17 So.2d 569 (1944). Citation and service of process (notice of the lawsuit) upon the state (body politic) as the principal-in-interest is effected, under La. R.S. 13:5107 and La. C.C.P. Art. 1265, only by service

upon the Governor, the chief executive officer of the State (La. Constitution Art. IV, Section 5), or the Attorney General, the chief legal officer and dejure "counsel of record" in civil cases for the state (La. Constitution Art. IV, Section 8). Although citations were addressed to the "State through the Department of Public Safety" and the "State through the Department of Highways," no service thereof was properly made upon the "State of Louisiana" (body politic) as the principal, but only upon such principal's agents (the two departments). It is thus contended that the principal itself lacked sufficient notice to be cast in judgment, particularly on grounds wholly unrelated to such principal's relationships to the two such agents served and that such lack of notice violated due process (and also equal protection as no other parties are to be treated thus under Louisiana practice). In fact, the Department of Transportation and Development (Highways) sent in attorneys who purported to represent their department only and set up a defense aimed to show only that Constable Smith was not an employee of the department alone, and the Department of Public Safety, worse yet, was represented only by counsel for Travelers (providing its insured with a defense) who ultimately contended that the State Treasury rather than Travelers was liable for damages (in other words, a defense in direct opposition to the principal-in-interest). The Louisiana Supreme Court, as it turns out, virtually held, before the principal-in-interest was ever served with citation or other notice of the lawsuit, that the principal-in-interest was liable for Constable Smith directly without regard to (and *not* "through") the two agencies and wholly unrelated to them.

Thus, without true participation by defendant-appellant per se, which had not yet been served with notice of the lawsuit, the plaintiff put on his presentation of evidence in chief at trial. Following his presentation of evidence, certain of the defendants, including the two agents of defendant-appellant, moved the court to dismiss the plaintiff's case against them pursuant to La. Code of Civil Procedure (CCP) Art. 1810(B). Article 1810(B) provides,

> In an action tried by the Court without a jury, after the plaintiff has completed the presentation of his evidence, any party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal of the action as to him on the ground that upon the facts and law, the plaintiff has shown no right to relief. The court may then determine the facts and render judgment against the plaintiff and in favor of the moving party or may decline to render any judgment until the close of all the evidence.

These motions to dismiss at the close of plaintiff's evidence were granted as to those defendants who were the alleged "masters" of Justice of the Peace's Constable Smith. The trial was continued as to the other defendants, and they were found liable to plaintiff-appellee in damages for personal injuries.

The state Court of Appeal, Third Circuit, affirmed the CCP Art. 1810(B) dismissals and affirmed the liability of the other defendants cast in final judgment but reduced the quantum of award.

The Louisiana Supreme Court granted writs and reversed the reduction in quantum of the award. The

state's high court also affirmed the liability of those defendants who had completed trials and been cast in judgment. Then, in testing the propriety of the granting of the CCP Art. 1810(B) motions, the state's high court (using the tests for CCP Art. 1810(B) motions—i.e., a postulated set of merely-possible facts gleaned only from plaintiffs's presentation of evidence and only from evidence, therefore, most favorable to plaintiff)—overruled and reversed the granting of the CCP Art. 1810(B) motions to the two agents of defendant-appellant, opining conflictingly that defendant-appellant was named in the suit through its two so-named agents but also that the postulated liability of defendant-appellant lay in its relationship directly to the constable and not through the only two so-named agents of defendant-appellant served with notice of the lawsuit.

It was only after remand from this decision of the Louisiana Supreme Court that defendant-appellant was at last properly served with notice of the lawsuit. But when counsel for defendant-appellant faced the proceedings on remand, what counsel discovered was that trial began where it had left off—at the close of plaintiff's evidence. Plaintiff-appellee's witnesses were not brought back for cross-examination. Moreover, the actual attitude of the courts was that the Louisiana Supreme Court, in overruling the CCP Art. 1810(B) motion, had expressed its final decision on the merits of this trial (even before defendant-appellant was ever served with notice of the lawsuit), and that the courts would go through the motions of a trial and appeal procedurally but, as for any practical substantive outcome, the out-

come on the merits expressed by the Louisiana Supreme Court, even in merely overruling a CCP Art. 1810(B) motion, would have to be fulfilled. Thus, in spite of the fact that defendant-appellant put on witnesses that had not yet testified and brought out new and different testimony and evidence showing key errors in the previous evidence and the prior misunderstandings of the true factual situation and in spite of new issues which were properly and timely raised by defendant-appellant and which, under the law, need to be resolved in order to cast liability on defendant-appellant, these courts, though conceding that this case required non-summarial, full-scope treatment and opinion (particularly on appeal) and paying lip-service to same, simply refused to acknowledge and address, much less attempt to resolve, these issues and evidence and rendered judgment against defendant-appellant in accordance with what they felt to be the wishes of the Louisiana Supreme Court as expressed on the prior appeal. In fact, the Court of Appeal, Third Circuit, expressly relied on the already "determined facts surrounding the accident" and "the conclusions of law based upon those facts."

Highlighting what is submitted to be the arbitrariness of such a decision is the context of Louisiana law concerning the circumstances and effect of the prior Louisiana Supreme Court opinion before remand and its supposed non-effect on defendant-appellant's right to be heard on subsequent issues and defenses.

First among the context of Louisiana law in this regard are the issues which were properly and timely raised, as the errors occurred, but which the state courts

refused to acknowledge and address. The Louisiana procedural law as to raising such issues is liberal. C.C.P. Art. 1635 states:

> Art. 1635. Exceptions unnecessary
>
> Formal exceptions to rulings or orders of the court are unnecessary. For all purposes it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

As to raising the issues on appeal, C.C.P. Arts. 2128 and 2129 state,

> Art. 2128. Same; determination of content
>
> The form and content of the record on appeal shall be in accordance with the rules of the appellate court, except as provided in the constitution. However, within three days, exclusive of holidays, after taking the appeal the appellant may designate in a writing filed with the trial court such portions of the record which he desires to constitute the record on appeal. Within five days, exclusive of holidays, after service of a copy of this designation on the other party, that party may also designate in a writing filed with the trial court such other portions of the record as he considers necessary. In such cases the clerk shall prepare the record on appeal as so directed, but a party or the trial court may cause to be filed thereafter any omitted portion of the record as a supplemental record. When no designation is made, the record shall be a transcript of all the pro-

ceedings as well as all documents filed in the trial court.

Art. 2129. Assignment of errors unnecessary; exception

An assignment of errors is not necessary in any appeal. Where the appellant designates only portions of the record as the record on appeal, he must serve with his designation a concise statement of the points on which he intends to rely, and the appeal shall be limited to those points.

As for this particular case, no particular parts of the record were designated, and the appeal was heard on the entire record. By rules, the Supreme Court of Louisiana, for writ applications, and the Louisiana Courts of Appeal, for appeals and rehearing applications, (the procedures this case followed) has provided for defining assignments of error (forming the basic issues) in, respectively, the writ application and appellate brief. Defendant-appellant has faithfully done so.

Secondly, these issues arose in connection with a remand after the state's high court postulated a theoretical factual situation for the limited purpose of testing and overruling a motion to dismiss at the close of plaintiff's evidence under C.C.P. Art. 1810(B), supra. In cases before a judge alone and not a jury, such as this one, some distinctions have now recently been made in the different state Court of Appeal circuits concerning the evidenciary standard to be applied, although its appears that at the time of this case in the Third Circuit, the view of the evidence in the light most favorable to plaintiff, was the standard. Be that as it may, to determine ultimate facts as to liability against a defendant,

who has not yet even been given the opportunity to present evidence, offends all notions of justice, even under Louisiana law. *Gunter v. Plauche et al.*, 399 So.2d 727 (La. App. 1st Cir., 1981). Likewise, it is submitted that it is arbitrary simply to rely on such postulated, theoretical factual findings made from only plaintiff's presentation of evidence for the ultimate decision on the merits without giving either a meaningful acknowledgment of or a meaningful analysis to the defendant's evidence, especially when that evidence is new and contains some uncontroverted showings that some key errors in the prior factual findings had been made.

Thirdly, it must be clearly understood that no kind of collateral estoppel exists at all in Louisiana, and the Civilian Law doctrine of "res judicata" under La. Revised Civil Code Art. 2286 is extremely narrower than the Common Law concept thereof. *Welch v. Crown-Zellerbach Corp.*, 359 So.2d 154 (La., 1978), preceded by *Mitchell v. B[illegible]lla*, 240 So.2d 287 (La., 1976). Thus, no findings in the first appeals in this case on the merits of plaintiff-appellee's action against other defendants can affect at all plaintiff-appellee's alleged action against defendant-appellant, and issues and assignments of errors ("grounds") raised by defendant-appellant after remand cannot be arbitrarily ignored or "estopped" by anything that occurred on the previous appeals. Given this context of Louisiana law, arbitrariness and capriciousness is clearly inferred by a court's refusal to adjudge such necessary issues and grounds.

In Louisiana, as in all other states, in an action for personal injuries sustained as a result of the alleged neg-

ligence of a defendant, the burden is on the plaintiff to prove all of the essential elements to establish negligence on the part of the defendant. *Sullins v. City of Shreveport*, 229 So.2d 390 (La. App. 2nd Cir., 1969). It is elementary that the plaintiff must produce proof in support of each and every element of his claim. *Livingston Supply Co. v. Basso*, 164 So.2d 141 (La. App. 1st Cir., 1964). Since the plaintiff must prove every element of his cause of action, the defendant needs only to defeat the plaintiff on one element to win. *Laird v. Travelers Indemnity Co.*, 236 So.2d 561 (La. App. 4th Cir., 1970). In a negligence action, such as the present case, the plaintiff has the burden of proof and ultimate persuasion throughout, and the trial judge at the conclusion of the trial weighs *all* the evidence offered and determines the preponderance. *Ned v. Hertz Corp.*, 356 So.2d 1974 (La. App. 4th Cir., 1978).

As the Court in *Wallace v. Shreveport Rys. Co.*, 175 So. 86 (La. App. 2nd Cir., 1973) stated,

> "The onus of proof, after the prima facie showing, strictly speaking, did not shift, but it did then devolve upon defendant to adduce proof of lack of negligence of its part. . . .
>
> "Although it has sometimes been stated that the burden of proof will shift to defendant on plaintiff making out a prima facie case, this statement is inaccurate, and, where defendant sets up a plea or answer denying its liability, the main burden of proof does not shift, but is on plaintiff throughout the case, even where a presumption of negligence exists, although where plaintiff introduces evidence sufficient to make out a prima facie case, it is then incumbent on defendant in order to prevent a recov-

ery to introduce evidence sufficient to overcome such showing by plaintiff. . . ."

The general rule is that the plaintiff, seeking to recover on a theory of negligence, is required to establish a prima facie case of negligence on the part of the defendant, after which the burden is on the defendant to go forward with evidence to rebut the inference of negligence. *Sansonni v. Jefferson Parish School Board*, 344 So.2d 42 (La. App. 4th Cir., 1977). It is axiomatic that the plaintiff must first establish this prima facie case before the defendant is obliged to rebut. *Greenup v. Barney*, 315 So.2d 910 (La. App. 4th Cir., 1975). The obligation to rebut plaintiff's prima facie evidence is the only "burden" to be placed on the defendant.

As explained by the Louisiana Supreme Court in *City of New Orleans v. Levy*, 233 La. 844, 98 So.2d 210 (La., 1957),

> "The burden of evidence . . . sometimes termed the burden of producing, or going forward with, the evidence, or the burden of procedure, shifts, or may shift, from side to side during the progress of the trial. . . . This burden of evidence is so continued until the party having the burden of proof establishes a prima facie case; nothing less will shift the burden of evidence. When such a prima facie case is established, the burden of evidence is shifted to the adverse party; the adverse party may, by the production of evidence destroying the prima facie case against him, satisfy the burden and restore it to the original party."

Therefore, while the burden of evidence or the burden of going forth with evidence may shift from party to party, the burden of proof and ultimate persuasion never

shifts from the plaintiff. This distinction is made clear in the *Levy* and *Wallace* cases, supra. The Louisiana Supreme Court, the Court of Appeal, and the district court, in failing to note this distinction, placed an improper burden of proof and ultimate persuasion on defendant-appellant that is never placed on other litigants in like circumstances and thereby violated due process and equal protection.

The Louisiana courts below effected an illegal and unconstitutional placing of the entire burden of proof and persuasion, which by law is placed on plaintiff, upon the defendant State of Louisiana to show that a "change" was warranted "in the court's [already] determined facts surrounding the accident" and "in the conclusions of law based upon such facts." *Hryhorchuk v. Smith*, 412 So.2d 197,200 (La. App. 3rd Cir., 1982). Thus, in this case, this improper shifting of the burden of proof and persuasion from the plaintiff (who would, in all other like cases, retain this burden throughout the course of the litigation) to defendant-appellant, possibly by confusing the burden of proof with the burden of evidence, is arbitrary and invidious in effect and thus violative of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

It is, likewise, submitted to be a violation of due process and equal protection clauses of both the federal and state constitutions for a state court to hold any person liable for damages caused through no fault of his own but only vicariously for an employee under the guise of *respondeat superior*, when the situation does not have the element of control expressed in Louisiana Civil Code Article 2320, which states,

Art. 2320. Masters and employers are answerable for the damages occasioned by their servants and overseers, in the exercise of the functions in which there are employed.

Teachers and artisans are answerable for the damage caused by their scholars or apprentices, while under their superintendence.

In the above cases, responsibility only attaches, when the masters or employers, teachers and artisans, might have prevented the act which caused the damage, and have not done it.

This is the same as the Common Law rule embedded in *stare decisis* at the times of the adoption of the Constitution of the United States and the Fourteenth Amendment thereto. Therefore, to hold a person liable without the element of control as expressed, for example, in the last sentence of Article 2320, above, in essence, arbitrarily casts liability on a faultless or innocent defendant for the tort of another over whom he had no control nor reasonable factual connection to warrant liability. One might simply, arbitrarily choose the richest man in town for liability.

The context of Louisiana law follows the general rule: A master or employer is liable for the tortious conduct of a servant or employee which is within the scope of employment, but a principal is not liable for the torts of a non-servant agent. Restatement of the Law, Second, Agency, § 250.

An agent's negligence is not imputable to the principal and the principal is not liable for such negligence unless a master-servant relationship exists between the parties. *Blanchard v. Ogima*, 253 La. 34, 215 So.2d 902

(La., 1968); *Traders and General Ins. Co. v. Robison*, 289 So.2d 178 (La. App. 1st Cir., 1973); *Badeaux v. East Jefferson General Hospital*, 364 So.2d 1348 (La. App. 4th Cir., 1978). Since liability should not be broadly or liberally imposed on a master or employer for the torts of his servant or employee where the master is not himself at fault, masters are only held liable for the acts of servants over whom they have control, as opposed to agents over whom they have little control. *Keen v. Pel State Oil Co., Inc.*, 332 So.2d 286 (La. App. 2nd Cir., 1976); *Florence v. Clinique Laboratories, Inc.*, 347 So.2d 1232 (La. App. 1st Cir., 1977). As the Fifth Circuit Court of Appeals recently stated,

> "A principal may be held liable for an agent's negligence if there is master-servant relationship. The indicia of such a relationship are the right of the principal to control the agent's time and physical activities and the existence of a close physical relationship between them." *Arceneaux v. Texaco, Inc.*, 623 F. 2d 924 (U.S. App. 5th Cir., 1980).

The mere fact that a constable is a public officer does not automatically transform him into a state officer. Under Louisiana law, R.S. 42:1 defines "public office" as any state, district, parish or municipal office. An examination of the element of control leads to the inescapable conclusion that a constable is a parochial office and *not* a state office.

Thus, it is further submitted to be a violation of equal protection for the state courts in this same case to apply the "power of control" standard to the Calcasieu Parish Sheriff's office and to the Calcasieu Parish Police Jury (the legislative governing body of the body politic,

Calcasieu Parish, itself) in order to find non-liability, while at the same time refusing to apply the same standard to defendant-appellant so that liability could be arbitrarily cast on defendant-appellant without any reference or regard to the lack of such power to control the manner of performing daily tasks and activities, etc.

Finally, the context of Louisiana law in which these issues arose is also that the very same factors and standards are to be applied alike to determine negligence liability and contributory negligence bar to recovery. *Stewart v. Gibson Products Company of Natchitoches Parish, Louisiana, Inc.*, 300 So.2d 870 (La. App. 3rd Cir., 1974). It is uncontroverted that Smith, defendant-appellant's alleged "servant," and plaintiff-appellee were both viewing the very same accident scene and the very same hazards thereof for the very same appreciable length of time before Clifton knocked Smith's parked car into plaintiff-appellee. In fact, plantiff-appellee was not as busy as Smith, but sat on or stood near a bridge rail near the side and rear of Smith's car where he could observe the previous eastbound vehicles coming up to Smith's car and being directed around the hazardous area and where he could observe whatever foreseeable risks of harm to himself there were right in plain view in front of him. Yet the state's courts ruled that Smith was negligent in failing to foresee the risk of harm to plaintiff-appellee and to take preventive steps not to breach any duty with respect thereto but that plaintiff-appellee was not contributorily negligent in also failing to foresee the very same risk of harm and taking preventive steps (merely walking a few paces out of the risk

area) to avoid same. It is submitted that such dichotomy of treatment of the very same factual situation provides the classic equal protection violation. In the manner done herein to cast legal liability on one in a judicial forum, it also violates due process.

THE QUESTIONS ARE SUBSTANTIAL

In the foregoing Statement of context in which the questions presented on this appeal arose, the questions presented hereinabove were defined both factually and legally with respect to this particular case, and it should be obvious that they provide a ratio decidendi to the ultimate outcome on the merits of this case and to its validity. For example, the generally classic federal equal protection question as to the dichotomy of treatment concerning negligence liability and contributory negligence bar to recovery operating in the same identical factual circumstances with respect to foreseeability of risks, etc., is an issue which goes directly to the heart and essence of whether ultimate liability can be validly cast on defendant-appellant in this case under the applicable state law which requires no overriding state interest to the contrary but rather that the same factors and standards be used. In conjunction with the questions presented herein about the state courts' failure to provide a meaningful hearing herein after proper notice of the lawsuit was served, the state courts simply refused to acknowledge and address, much less resolve, this generally classic federal equal protection issue, nor the other issues, properly raised by defendant-appellant. Had they done so, a judgment worth $627,389.24 could not and would not, it is submitted, have been cast. As it

stands now, such equal protection question presented herein could and should, by itself alone or in cumulative conjunction with the other questions presented herein, turn the entire case and invalidate the judgment. Thus, there can be no doubt about the substantiality of the questions presented herein.

But the substantiality of the federal constitutional questions presented on this appeal, defined and described hereinabove, transcends the substantial value of this case alone. These questions on appeal herein reach to the heart of the very foundations of American society, for the Louisiana courts below, particularly at the Court of Appeal level, have, as explained hereinabove, conceded that this case is one requiring non-summarial, full-scope treatment and opinion. Contrary to any countervailing overriding state interest in such doctrines as collateral estoppel and Common Law scope res judicata for judicial economy, the Louisiana courts have long declared, as explained in the Statement, supra, that neither collateral estoppel nor Common Law scope res judicata exists at all whatsoever in Louisiana, but rather only the very narrow one-party-on-one-party, same identical "grounds," and same demand type of res judicata peculiar to the Civilian-Law-based Louisiana Revised Civil Code Art. 2286. Thus, the judicial, lack-of-timely-notice (service of process) treatment given to defendant-appellant in this case by the Louisiana judiciary, as described and explained more fully in the Statement hereinabove, is proclaimed by the state courts to be the very same treatment and process that can be imposed in Louisiana at the state court's whim in any given ordinary proceedings case, one-party-on-one-

party, from its outset. And it is submitted that such treatment and lack of timely judicial process, described and defined more fully in the Statement, supra, falls woefully short of the fundamental notions required by American society and its constitution.

As Mr. Justice Harlan explained in *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed. 2d 113 (1971),

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitely settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the "state of nature."

It is fundamentally unfair and, therefore, unconstitutional to hold a defendant liable in damages without addressing the defendant's arguments in defense. *Boddie v. Connecticut*, supra; *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct 1983, 32 L.Ed. 2d 556 (1972). Due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons who must settle their claims through litigation must be given a meaningful opportunity to be heard, granted at a

meaningful time and in a meaningful manner and without a shifting in burdens of proof or persuasion. *Boddie*, supra; *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct 1187, 14 L.Ed. 2d 62 (1965). Even though the formality and procedural requisites for the hearing can vary depending upon the importance of the interest involved and the nature of the subsequent proceeding, the litigant must be given the opportunity for a hearing before he is deprived of a property interest. Without this hearing in a meaningful manner appropriate to the nature of the case, the mandates of the Due Process Clause have not been complied with. *Boddie*, supra, at 786-787; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 at 313, 70 S.Ct 652 at 656, 94 L.Ed. 865 (1950). The Louisiana courts below are merely sought herein to fulfill, in a constitutionally valid manner, their basic duties under the laws and rules by which they ordinarily operate; no new duties for them are urged herein.

Closely allied to and somewhat overlapping these due process requirements and certainly not mutually exclusive from them, are the requirements of equal protection. The questions presented on this appeal drive to the very axiomatic foundations of even the most minimal notions of equal protection—that is, "equal protection of the laws" means that no one shall be denied the same protection of the laws enjoyed by or afforded to others in like circumstances. See, for example, *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed. 2d 506 (1964) and other cases too numerous to cite. In this case on appeal, the state courts not only failed to articulate any rational basis or overriding state interests in treating defendant-appellant differently and in failing to afford

defendant-appellant the same protection and defenses of the laws afforded to other litigants (especially defendants) in similar cases and circumstances, before casting them in a substantial money judgment, but they, moreover, made even no pretense whatsoever that there were any rational classifications (nor any different classifications at all, rational or otherwise) into which defendant-appellant might fall. They simply, arbitrarily denied to defendant-appellant the same legal defenses, procedures, and protections afforded to others under state law, as more fully described and explained hereinabove.

The question presented with respect to the state courts' thrusting on defendant-appellant in this case the ultimate burdens of not only proof but also persuasion, while in all other like cases such burdens are always on plaintiffs and not defendants in similar circumstances, is more than an incidental procedural question in this case. The opinion of the Louisiana Court of Appeal, Third Circuit, in stating that defendant-appellant failed to carry the burden of showing that a "change" was warranted in the already "determined facts surrounding the accident or in the conclusions of law based on such facts," explicitly relied on such thinking as the ratio decidendi of its decision to affirm the judgment on the merits herein against defendant-appellant. Since the Louisiana Supreme Court merely denied defendant-appellant's writ application, this question presented on appeal here strikes at the only articulated reason for the judgment appealed from.

The question concerning the same standards and factors for negligence liability and contributory negli-

gence bar to recovery, too, follows the basic, axiomatic equal protection meaning, for, contrary to purporting to create a differentiating classification or a countervailing state interest, the state law, as described in the Statement, supra, confirms that the same factors and standards are to be used. Thus, defendant-appellant's position is not that equal protection with respect to this issue was violated in the face of having to balance a state law interest to the contrary, but rather that *both* equal protection *and* state law were contravened by the judgments in the state courts below. This state law issue was never passed on, and no contrary state law interest vis-a-vis the equal protection issue was ever articulated, all because the state courts below arbitrarily in violation of due process and equal protection refused to acknowledge and address these issues (assignments of error), even though they were properly and timely raised, as explained in the Statement, supra.

The question presented regarding the casting of vicarious liability on a faultless defendant for the fault (tort) of another over whom he does not have the power of control that is universally recognized as the primary indicia of *respondeat superior* liability nor even from whom he receives any real economic benefit, also entails invidious wealth discrimination, as such arbitrary overreachings to cast liability on faultless defendants is, as was the case herein, usually motivated by a desire to catch someone (even only nominally connected with the case) who has the potential or substantial ability to pay large damage awards.

CONCLUSION

For any one or more of the foregoing reasons, probable jurisdiction should be noted for this appeal.

As an equally viable alternative, however, at this point, attention must be given to the fact that, as explained hereinabove, the state courts arbitrarily in violation of due process and equal protection ignored many state law issues properly and timely raised by defendant-appellant in this case. Some of these state law issues, if they were faced and decided by the state courts below, could have provided other dispositions of this case which might have otherwise avoided the federal constitutional questions raised, though, as the case stands now with the state courts' refusal to acknowledge and address these other state issues, this case stands ripe for the federal constitutional questions explained herein. Thus, it is brought to this Honorable Court's attention that the most facile way of giving effect to the constitutional protections which were violated in this case, might be, at least at this stage of the case, to treat this appeal perhaps as a writ application for the sole purpose of reversing or merely vacating the judgment appealed from herein and remanding to the Louisiana Supreme Court for a decision on these other issues of state law that remain as yet unresolved herein, similar to what was done, for example, in *U.S. v. Ballard*, 332 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1943) and *Aetna Gas. and Sur. Co. v. Flowers*, 330 U.S. 464, 67 S.Ct. 798, 91 L.Ed. 1024 (1946).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas S. Halligan, one of the assistant attorneys general for the State of Louisiana, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the seventeenth day of September, 1982, I served copies of the foregoing Jurisdictional Statement, by mailing copies thereof in duly addressed envelopes, with first class postage prepaid, upon the following:

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Court of Appeal
Third Circuit
% Honorable Kenneth deBlanc, Clerk
State of Louisiana
Calcasieu Parish Courthouse Annex
Lake Charles, Louisiana 70601

Fourteenth Judicial District Court
Parish of Calcasieu
% Honorable Acton Hillebrandt
Clerk of Court
Post Office Box 1030
Lake Charles, Louisiana 70602

Supreme Court of Louisiana
% Honorable Frans J. Labranche, Jr.
Supreme Court Building
301 Loyola Avenue
New Orleans, Louisiana 70112

Baton Rouge, Louisiana, this seventeenth day of September, 1982.

/s/ THOMAS S. HALLIGAN

APPENDIX A

The Supreme Court

of the State of Louisiana

ROY HRYHORCHUK

VERSUS

ROY M. SMITH, ET AL

C/W 82-C-1363

ROY HRYHORCHUK

VERSUS

CALCASIEU PARISH POLICE JURY, ET AL

Re: State of Louisiana, applying for Writ of Certiorari and Review, Parish of Calcasieu, Third Circuit Court of Appeal, Nos. 8733 and 8734.

June 21, 1982
Denied.

JCW
JAD
PFC
JLD
HTL

MARCUS & BLANCHE, J.J. would grant the writ.

Supreme Court of Louisiana
June 21, 1982

/s/ FRANS J. LABRANCHE, JR.

Clerk of Court
For the Court

APPENDIX B

NO. 8733
COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

ROY HRYHORCHUK

Plaintiff-Appellee,

VERSUS

ROY M. SMITH, ET AL

Defendants-Appellants.

Appeal from the Fourteenth Judicial District Court, Parish of Calcasieu, State of Louisiana, Honorable W. ELLIS BOND, District Judge, Presiding.

Before CULPEPPER, GUIDRY and STOKER, Judges

Guidry, Judge

The above numbered and entitled matter is consolidated with a companion suit entitled Roy Hryhorchuk versus Calcasieu Parish Police Jury, et al, _____ So.2d _____, our docket number 8734. We this day render a separate decree in the matter last referred to.

These consolidated matters are on appeal to this court following further trial in the district court on remand from the Louisiana Supreme Court. We here refer to our original opinion in these consolidated cases, which is reported at 379 So.2d 281 (La. App. 3rd Cir., 1979) and to the Supreme Court opinion, following grant of writ applications, which is reported at 390 So.2d 497 (La., 1980) for a complete history of this litigation, including an analysis of the facts and the Supreme Court's conclusions on the issues presented on appeal. The Su-

preme Court judgment, reported as aforestated, decreed as follows:

> "For the foregoing reasons, the judgment of the Court of Appeal is affirmed in favor of the Calcasieu Parish Police Jury and the Calcasieu Parish Sheriff's Department and their insurers. The judgment of the Court of Appeal is reversed insofar as it affirmed the directed verdicts in favor of the State of Louisiana, Through the Department of Public Safety, and the State of Louisiana, Through the Department of Transportation and Development. The judgment of the Court of Appeal reducing the quantum of damages is vacated and set aside. The judgment of the trial court in favor of plaintiff against Smith and Clifton and their insurers is affirmed but it is ordered that there be further trial on the issue of the liability of the State of Louisiana. The question of the liability of State Farm in its capacity as Hryhorchuk's uninsured motorist carrier remains open pending further disposition in the trial court." (footnote omitted)

Pursuant to the Supreme Court's decree a further trial was held in the district court resulting in a judgment in favor of Roy Hryhorchuk and against the defendants, Roy M. Smith, William Clifton, State Farm Mutual Automobile Insurance Company, Pennsylvania General Insurance Company and the State of Louisiana, insolido in the sum of $627,389.24 together with legal interest from date of demand until paid and for all costs. The judgment rendered by the trial court as aforesaid limited the liability of the insurers to the limits of their respective policies and granted State Farm Mutual Automobile Insurance Company a right of reimbursement

from Roy Hryhorchuk for any amount which he might recover from any of the other defendants and recognized the intervention of Lawanda Hryhorchuk to the extent of $34,360.10. The trial court judgment further ordered a dismissal of plaintiff's demands against the Department of Public Safety and its insurer, Travelers Insurance Company, and the Department of Transportation and Development. The State of Louisiana has appealed from this latter judgment. The other defendants have not appealed nor did plaintiff answer the appeal of the State of Louisiana, however, plaintiff-appellee has filed a motion seeking dismissal of the appeal of the defendant-appellant, State of Louisiana. We will first consider this motion.

MOTION TO DISMISS

The plaintiff-appellee, Roy Hryhorchuk, moves to dismiss the appeal of the defendant-appellant, State of Louisiana. The motion is based on the contention that the issue on appeal, the state's liability to Hryhorchuk for damages allegedly caused in part by negligence of a parish ward constable, was previously adjudicated and determined by a non-appealable final judgment.

The case is before this court on a devolutive appeal from a district court judgment following a remand by our Supreme Court. At the first trial the district court sustained motions under LSA-C.C.P. art. 1810(B), for dismissal of the plaintiff's case against the State of Louisiana, through the Department of Public Safety and Department of Transportation, and also other defendants. The trial proceeded with respect to the remaining defendants who were found to be liable to the plaintiff and

were so cast in a judgment for damages. One of these was Constable Roy Smith.

On appeal, this court in Hryhorchuk v. Smith, 379 So.2d 281 (La. App. 3rd Cir., 1979), reduced the damages awarded, but affirmed the liability holdings. The Supreme Court granted writs and reversed the C.C.P. 1810(B) motion of the State and also the reduction of the award. Its decree remanded the case to the district court for further trial on the issue of the liability of the State. 390 So.2d 497 (La., 1980).

On remand the district court rendered judgment in favor of the plaintiff Hryhorchuk against the State and the latter has appealed.

Plaintiff-appellee has filed this motion to dismiss, contending that the decision of the Supreme Court was a final judgment as to the liability of the State for the acts of Constable Roy Smith. His argument is based upon the following language in that court's decision in Hryhorchuk:

> "When a constable is acting in his capacity as a public officer, the State of Louisiana is liable for a tort resulting from his negligent performance of an official duty. Constable Smith was at the scene of this accident in discharge of the duties of his office. Therefore, the State of Louisiana is liable for the negligence of Smith in the course of his employment. Foster v. Hampton, 381 So.2d 789 (La., 1980).

This statement by the Supreme Court is, of course, correct, but it is not the complete holding of the court. It was made in the context of deciding whether or not the State is legally responsible for a directed verdict at the

close of the plaintiff's evidence. The language certainly does not mean that the Supreme Court was rendering a final judgment on the merits of the issue of the State's liability to the plaintiff, because no evidence had been presented by the State regarding Constable Smith's negligence vel non and that issue had not been fully adjudicated between the plaintiff and the State.

Furthermore, reasons expressed by a court in its opinion are separate and distinct from and form no part of the decree, which is the definitive judgment. *Petty Realty Co. v. Continental Cas. Co.*, 47 So.2d 446 (La. App. 2nd Cir., 1950). Therefore, only the decree itself constitutes the appellate judgment. The Supreme Court expressly said in its decree:

> "The judgment of the trial court in favor of plaintiff against Smith and Clifton and their insurers is affirmed but it is ordered *that there be further trial on the issue of the liability of the State of Louisiana.*" (Emphasis added.)

It is clear to us that the judgment did not decide the issue of the State's liability, but merely remanded the case to complete the trial of plaintiff's alleged cause of action against the State of Louisiana.

For the above and foregoing reasons, the motion to dismiss is denied.

MERITS

Appellant principally contends on appeal that the evidence presented at the trial of this matter following remand, produced a set of facts significantly different from those presented at the previous trial. Appellant

argues that this new evidence reflects error in the previous conclusions reached by the several courts as to the negligence of Smith; the lack of negligence on the part of Hryhorchuk; and this court's conclusion that at the time of the accident Smith was neither the employee or agent of the Department of Public Safety and the Department of Transportation and Development.[1] In this same vein, the State of Louisiana argues that the learned trial judge did not give proper weight to this new evidence but merely accepted the facts as found by the several courts following the initial trial.

We find no merit in appellant's contention. The trial judge, in his written reasons for judgment, makes clear that he felt constrained to make a further finding on the issues of fact initially found in order that a judgment might be properly rendered insofar as the State of Louisiana, the Department of Public Safety and its insurer, and the Department of Transportation and Development are concerned. The trial court then made clear that the evidence adduced at the second trial was not such as to warrant any change in the determined facts surrounding the accident or in the conclusions of law based upon such facts. Our careful review of the evidence adduced at the second trial prompts the same conclusion.

In sum, for the reasons previously assigned by us and reported as 379 So.2d 281 and in conformity with the

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[1] It is observed that the Supreme Court in its decision reported at 390 So.2d 497 pretermitted consideration of whether Smith was acting as agent of the two departments and reversed the judgment of this court insofar as it affirmed the directed verdicts in favor of those departments.

decision of the Louisiana Supreme Court reported at 390 So.2d 497, we conclude that on the occasion in question Smith was not acting as an agent or employee of the Department of Public Safety or the Department of Transportation and Development; that he was acting in his capacity as a public officer of the State of Louisiana; that his actions on the occasion in question were negligent and caused Hryhorchuk's injuries; and, that Hryhorchuk was not guilty of any contributory negligence. Accordingly, the trial court judgment appealed from is affirmed at appellant's cost.

No. 8734

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

ROY HRYHORCHUK

Plaintiff-Appellee,

VERSUS

CALCASIEU PARISH POLICY JURY, ET AL

Defendants-Appellees-Appellants.

Appeal from the Fourteenth Judicial District Court, Parish of Calcasieu, State of Louisiana, Honorable W. ELLIS BOND, District Judge, Presiding.

Before CULPEPPER, GUIDRY and STOKER, Judges

GUIDRY, Judge

For the reasons assigned in the companion matter entitled Roy Hryhorchuk versus Calcasieu Parish Police Jury, et al, _____ So.2d _____, our docket number 8733, the judgment of the trial court is affirmed at appellants' cost.

AFFIRMED.

APPENDIX C

14TH JUDICIAL DISTRICT COURT
PARISH OF CALCASIEU
STATE OF LOUISIANA

ROY HRYHORCHUK
VS. NO. 77-1496
ROY M. SMITH, ET AL

AND

14TH JUDICIAL DISTRICT COURT
PARISH OF CALCASIEU
STATE OF LOUISIANA

ROY HRYHORCHUK
VS. NO. 78-4318
CALCASIEU PARISH POLICE
JURY, ET AL

BOND, Judge

In this matter the Supreme Court of Louisiana remanded and ordered that there be further trial on the issue of the liability of the State of Louisiana. In doing so that court ruled that the State of Louisiana is a proper party defendant inasmuch as it had been named as a defendant "through the Department of Transportation and Development" and "through the Department of Public Safety".

The remand and further trial were necessary because those two departments (and consequently the State) were released from the case on motions during the original trial when a plaintiff rested his case, and as a result had no opportunity to present a defense.

Accordingly, the case was rescheduled and the court reopened the case at the point where plaintiff rested,

thereby giving opportunity to counsel for the Department of Transportation and Development, the Department of Public Safety, as well as the Attorney General, on behalf of the State of Louisiana, to conduct their defense. All other counsel were given an opportunity to participate and present any rebuttal they chose. Counsel for Travelers Insurance Company represented that company and the State, "through the Department of Public Safety".

Plaintiff and both individual defendants were called on cross-examination, as well as some of the original witnesses. The facts preceeding the collision, concerning participation by employees of the Department of Transportation and Development and Department of Public Safety, were thoroughly explored as well as the conduct of Constable Smith. Counsel for the State also fully cross-examined plaintiff about his injuries and recovery, if any, since original trial.

The Supreme Court affirmed this court's finding that Constable Smith was negligent in the performance of his official duties. However, that finding was as to Smith individually, and, although the Supreme Court has ruled that the State was liable for such acts, the ruling was based on the record as it then existed when the State had had no opportunity to present a defense.

This court feels constrained therefore to make a further finding on the same issue of fact in order that judgment may be properly rendered as it affects the State of Louisiana as well as "the Department of Public Safety" and its insurer, Travelers Insurance Company,

and "the Department of Transportation and Development".

FINDINGS OF FACT

From the record in its entirety the court determines that Constable Smith, in going to the scene of the Thompson accident, was acting completely at his own discretion and in his official capacity as an elected peace officer in Ward 5 of Calcasieu Parish. He was not subject to any control or direction in his duties by any officer or official of either the Department of Transportation and Development or the Department of Public Safety regardless of what position they occupied therein, up to and including their directors. He was, however, accountable for any violations of the law the same as any person, as was recognized by Officer Bolt when he issued a traffic citation to him. The record not only demonstrates that Constable Smith did not accept any agency authority. He simply undertook an action for the protection of the public generally, under the powers granted him by the Legislature and the electorate in the parish ward he served.

Constable Smith performed his official duties in this case in a negligent manner that was a causative factor in injuries and damages suffered by plaintiff.

Plaintiff was not contributorily negligent.

The original findings of this court as to damages suffered by plaintiff are adopted for purposes of this decision. The additional trial procedure supported the court's anticipation in its original opinion of the continu-

ing effects of plaintiff's injuries and consequent damages.

Having determined that there is no liability herein upon the Department of Public Safety and its insurer, Travelers Insurance Company, and the Department of Transportation and Development of the State of Louisiana, the record demonstrates that defendants, Clifton, Smith and the State of Louisiana, who are liable to plaintiff are underinsured under the provisions of LSA-R.S. 23:1406. Consequently, State Farm Mutual Automobile Insurance Company is liable to plaintiff for its policy limits of $20,000.00 under plaintiff's uninsured motorists coverage, subject to State Farm's right to reimbursement for any amount which plaintiff may recover from Smith, Clifton or the State of Louisiana, up to the amount that State Farm has paid or will pay under that coverage. (LSA-R.S. 23:1406 D and *Thibodeaux v. Olivier*, 394, So.2d 684, Third Circuit, Feb. 4, 1981).

The intervention filed herein by Lawanda Hryhorchuk, legally separated wife of plaintiff, prays that she be recognized as the owner of an undivided one-half of that portion of plaintiff's claim which would fall into the community formerly existing between them. Because of the possibility of liabilities of the community (such as possibly medical expenses covered by the award to plaintiff) or offsets between the former marriage partners, the court will limit its declaration to the portion of the judgment which by operation of law falls into said community.

The judgment awarded by plaintiff is in the total

sum of $627,389.24, representing awards as follows:

Medical Expenses	$ 24,249.56
Wages (future $471,209.93 and from injury to date of trial $31,929.75)	502,139.68
Pain and Suffering	100,000.00

The portion falling into the former community is that portion of each figure which accrued during the period of April 28, 1976, the date of the accident, and August 4, 1977, the termination of the community. (See *West v. Ortego*, 325 So.2d 242 (La., 1975)

The loss of wages award of $31,929.75 for the period between the date of injury, April 28, 1976, and the testimony of Dr. Chisholm (T-349) May 31, 1978, represents $1,277.19 per month. The community continued until August 4, 1977, a period of fifteen and one-fourth months. The amount of lost earnings falling into the community is $19,477.15.

All of the award of $24,249.56 for medical expenses represented debts incurred during the existence of the community and that award would be an asset of that community.

The award of $100,000.00 for pain and suffering contemplated not only the pain from the initial injury and operations that ensued but also the expected remainder of plaintiff's life when each day will present him with some degree of physical pain along with the awareness of being disabled. The additional trial procedure disclosed that such anticipation by plaintiff's witnesses (and the court) were reasonably accurate. The court feels that $25,000.00 of that award is appropriate for the first fif-

teen and one-fourth month period following the injury.

Grouping these three figures, $19,477.15, $24,249.56 and $25,000.00, it follows that $68,726.61 of the total award is a community asset and the remainder is the separate property of plaintiff. The court will leave plaintiff and intervenor to resolve the community dissolution in other appropriate proceedings.

The parts of the prior judgment of this court as affirmed by the Supreme Court, insofar as it affects defendants Clifton, Smith, State Farm and Pennsylvania Insurance Company, are, of course, undistrubed.

Judgment in accordance with these views should be presented within ten days, in accordance with court rules.

Lake Charles, Louisiana, this 12th day of June, 1981.

/s/ W. ELLIS BOND
District Judge

APPENDIX D

Supreme Court of Louisiana

Nos. 67,014, 67,021 and 67,027

ROY HRYHORCHUK

VERSUS

ROY SMITH, ET AL

AND

ROY HRYHORCHUK

VERSUS

CALCASIEU PARISH POLICE JURY, ET AL

October 6, 1980

Rehearing Denied December 5, 1980

ON WRIT OF REVIEW TO THE THIRD CIRCUIT COURT OF APPEAL, PARISH OF CALCASIEU

WATSON, Justice.

Plaintiff, C. B. Roy Hryhorchuk, a pedestrian, received severe personal injuries on April 28, 1976, at the scene of an automobile accident in Ward 5 of Calcasieu Parish. Intervening in the suit is his separated wife, Lawanda Hryhorchuk. Defendants are the following: (1) Constable Roy M. Smith and his liability insurer, State Farm Mutual Automobile Insurance Company; (2) the Calcasieu Parish Police Jury and its insurers, United States Fidelity & Guaranty Company, Houston General Insurance Company and Travelers Insurance Company;

(3) the Calcasieu Parish Sheriff's Department and its liability insurer, North River Insurance Company; (4) the State of Louisiana, through the Department of Public Safety,[1] (5) the State of Louisiana, through the Department of Transportation and Development; (6) William Clifton and his liability insurer, Pennsylvania General Insurance Company; (7) State Farm Mutual Automobile Insurance Company, plaintiff's uninsured motorist carrier.

At the conclusion of the plaintiff's evidence, the trial court gave a directed verdict, dismissing plaintiff's demands against the Police Jury, the Sheriff's Department, the State of Louisiana Through the Department of Public Safety, the State of Louisiana Through the Department of Transportation and their insurers. At the conclusion of trial, judgment was rendered in favor of plaintiff against defendants, Roy M. Smith, William Clifton, State Farm and Pennsylvania General, in solido, for $40,000, the limits of liability of the insurance policies. Judgment was also rendered in favor of plaintiff against Smith and Clifton in solido for $587,389.24.

The Court of Appeal, Third Circuit, affirmed the trial court judgment on the liability issues. The Court of Appeal reduced the award of $587,389.24 against Smith and Clifton personally to $50,000 on the basis of their inability to respond in damages. *Hryhorchuk v. Smith*, 379 So.2d 281 (La. App. 3rd Cir., 1979).

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[1] The Department of Public Safety is allegedly insured by Travelers Insurance Company, but the trial court refused to allow a supplemental petition to make Travelers a defendant in that capacity.

The writ applications of plaintiff Hryhorchuk, defendant Smith and his insurer, and plaintiff's uninsured carrier, State Farm, were granted to review the judgment. 381 So.2d 1231, 381 So.2d 1225, 381 So.2d 1226 (La., 1980).

FACTS

These multiple accidents occurred on Louisiana Highway No. 12 three miles from the Texas border in the western part of Calcasieu Parish near Starks, Louisiana. Huey P. Thompson, who was intoxicated, ran off the road and onto the south guard rail of a bridge approach. His vehicle came to rest two to five feet clear of the road. A second minor accident, unconnected with Thompson's, caused congestion but also did not block the highway.

William Chapman, a civil service employee of the Department of Transportation, was on duty at the Starks weigh station, which is located one-half mile east of the bridge. The caution lights of the weigh station are visible at the bridge. Chapman and other weigh station employees testified that providing notification of accidents was something they were expected to do. They were instructed to cooperate with all law enforcement agencies. Chapman learned about the situation from a passing trucker, and contacted the Louisiana State Police Headquarters of Troop D in Lake Charles on a police band radio. He was asked to have someone stand by to flag traffic until a trooper could arrive, a standard practice in this rural area. It is forty miles from the Starks scales to Troop D Headquarters. Chapman called the Sheriff's Department but no deputy was available so

he asked Roy Smith, Constable of Ward 5, to go to the scene. Chapman said responding to accidents was expected of Smith as a Constable. Smith also testified that this was one of his duties as a peace officer serving the people of Ward 5.

Smith arrived at the accident site about 9:50 P.M. and parked next to the Thompson truck in the eastbound lane of traffic facing west. Several vehicles had safely passed in an eastbound direction prior to his arrival. The truck's headlights were off. There were safer places available for Smith park; the shoulders were approximately ten feet wide. He placed a small "Kojak" light on the top of his dark blue 1971 Plymouth and turned off the headlights, but left on his amber blinkers. The blinkers on this model car are quite low, on or near the bumper. The hood of the car was slightly raised to allow the engine to remain cool. Hryhorchuk, a friend of Thompson, was standing off the roadway in front of Thompson's truck. Other automobiles and people were nearby. A good samaritan, Harold Ellis, was standing a hundred feet west of the bridge swinging a six volt hand lantern to alert approaching vehicles. During the thirty minute interval between Smith's arrival at the accident scene and Hryhorchuk's injuries, ten or fifteen automobiles passed in both directions. Clifton, who was coming from Texas, saw a blinking light while still a distance from the bridge. He was very familiar with the road and assumed that what he had seen was the caution lights at the weigh station. When he reached the bridge approach, Clifton was momentarily distracted by cars parked on the shoulder and the Ellis lantern. He struck the Smith vehicle without slowing, while traveling 50 to 55 miles per

hour. Smith was, of course, parked squarely in Clifton's lane of traffic. The head-on impact between the automobiles propelled the Smith car into Hryhorchuk, knocking him over the bridge embankment into a ravine below. This accident occurred about 10:30 P.M.

State Trooper Bert A. Bolt, Jr., arrived seconds after Hryhorchuk was injured. Roy Smith was on duty when Bolt arrived. A Sheriff's unit was also present at one point. Bolt testified that it is customary in that part of the parish for deputies or constables to tend to injuries, secure the scene and direct the traffic at accidents pending a trooper's arrival. In Bolt's opinion, Constable Smith's automobile was parked in a hazardous position. Bolt cited Clifton for not maintaining reasonable and proper control of his vehicle.

Constable Smith is an elected official. He was first elected as Constable for Ward 5 of Calcasieu Parish in 1972.[2] The term is four years. At the time of the accident Smith received either $60 or $150 per month from the Parish of Calcasieu. There was a raise at about that time. Constable Smith also had a honorary commission as a deputy sheriff for Calcasieu Parish, but he testified that he went to the accident scene in his capacity as a constable. An affidavit by Sheriff Henry A. Reid, Jr., attests to the fact that Roy M. Smith was not a regular deputy sheriff or a compensated employee of the Calcasieu Parish Sheriff's Department at the time of the accident. Smith has never been formally advised of what

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[2] In Smith's 1972 election as Constable, he defeated incumbent Huey P. Thompson.

a constable's duties are. His office is bonded. He has assisted at other accidents and has made arrests for reckless driving. At the State Attorney General's annual meetings for Justices of the Peace and Constables, Smith was instructed that his duty as a peace officer is to arrest anyone breaking the law. Smith understood his duties to include serving papers for the Justice of the Peace and general service to the residents of Ward 5.

An affidavit by Captain Clarence C. Barton, Captain of Troop D of the Louisiana State Police, a Division of the Louisiana Department of Public Safety, states that Roy M. Smith was not acting on behalf of the State Police of Troop D nor the Department of Public Safety at the time of the accident. The affidavit further states that the radio dispatcher at Troop D is not authorized to request assistance at the scene of an accident unless authorized by an executive officer or desk sergeant and that no request of that nature was made by a radio dispatcher as to the services of Constable Smith in this accident.

The trial court concluded that Hryhorchuk is now a semi-invalid as a result of extensive damage to the tissue, skin and bone of the right leg which required fourteen operations. His disability as a whole is estimated at twenty-five percent and he will suffer for the rest of his life from recurrent swelling, dormant osteomyelitis or bone infection, and pain. He can no longer work in his previous occupation as a welder where he would have earned approximately $15,000 during the year of the accident. The trial court stated in reasons for judgment that not only has Hryhorchuk's work and recreational life been completely disrupted, but that the accident has

also contributed to the dissolution of his home. Hryhorchuk, thirty-four years old at the time of the accident, was awarded the discounted amount of his future lost earnings, or $471,209.93, together with $100,000 for pain and suffering and medical expenses of $24,249.56, plus $31,929.75 for loss of wages between accident and trial.

The first issue is the liability of Smith and Clifton.

The evidence amply supports the trial and appellate court's conclusion that the actions of Smith and Clifton combined to cause Hryhorchuk's injuries. The trial court found that Clifton breached his duty of care to the public by failing to slow as he approached the accident scene despite the presence of the "Kojak" light, Smith's blinkers and the lantern waved by Ellis. In view of the activity at the scene, Clifton should have been able to stop or at least slow his automobile before the impact. The testimony was that there was no reduction in his speed and he violated his legal duty to the public in general and Hryhorchuk in particular. The trial court did not err in finding that Clifton's behavior was negligent and substandard.

As to Smith, his commendable purpose was to alert people to the presence of the truck on the bridge railing. However, the truck was clear of the roadway. Smith, by parking his car squarely in the eastbound traffic lane facing west, created an additional hazard which combined with Clifton's negligence to produce Hryhorchuk's injuries. Although Smith had some blinkers and a small "Kojak" light on his automobile, he breached his duty to other motorists by parking on the roadway. Blocking the eastbound traffic lane in the dark was inherently

dangerous and "unnecessary to the performance of the emergency function," *Hryhorchuk v. Smith*, 379 So.2d 281 at 288. Compare *Pierre v. Allstate Insurance Company*, 257 La. 471, 242 So.2d 821 (1971) and *Dixie Drive It Yourself Sys. v. American Beverage Co.*, 242 La. 471, 137 So.2d 298 (1962). Smith was negligent.

There is no evidence to establish that Hryhorchuk was contributorily negligent in being at the accident scene trying to render assistance to his friend Thompson. Hryhorchuk was off the road and had no reason to anticipate the sequence of events which occurred.

As to the plaintiff and the two individual defendants, the trial and appellate courts correctly decided the liability issues.

The next question is whether a directed verdict should have been granted in favor of any or all of the other defendants.

The Court of Appeal correctly found that Smith was not acting as an employee or agent of the Calcasieu Parish Police Jury or the Calcasieu Parish Sheriff. Neither the Police Jury nor the Sheriff exercised any supervision over his activities, the most important element in determining employee status. Part of Smith's salary was paid by the Parish. LSA-R.S. 13:2589. However, the Parish had no right to control his activities or to dismiss him. Further, the evidence does not establish that Smith was acting as an agent or direct representative of the Sheriff's Office or the Parish. Smith went to the scene of the accident in his capacity as Constable of Ward 5 of Calcasieu Parish, an elected office. Compare *Chaudoin v. Fuller*, 67 Ariz. 144, 192 P.2d 243 (1948).

There is no liability on the part of the Parish of Calcasieu or the Sheriff of Calcasieu Parish.

A state office is one created by the Constitution or state statute. The Court of Appeal stated:

> "It is well settled that a 'state office' is one created by the constitution or state statute. *State v. Dark*, 195 La. 139, 196 So. 47 (La. 1940); *State v. Titus*, 152 La. 1011, 95 So. 106 (La. 1922); *Chappuis v. Reggie*, 222 La. 35, 62 So.2d 92 (La. 1952). The office of Constable is a creature of the legislature. LSA-R.S. 13:2581." 379 So.2d at 290.

A constable is an elected officer whose duties are similar to those of a sheriff, although his powers are much less and his jurisdiction smaller. LSA-R.S. 13:2581.2. Like sheriffs and deputy sheriffs, constables are state officers. *Williams v. Guerre*, 182 La. 745, 162 So. 609 (1935); *State v. Jones*, 181 La. 390, 159 So. 594 (1935); *State v. Titus*, supra; *Foster v. Hampton*, 352 So.2d 197 (La., 1977). Constables perform public functions with authority derived from the State by legislative enactment. As such, a constable is a public officer who exercises a delegated portion of the sovereign power of the State of Louisiana. *State v. Dark*, supra. Constables have civil duties but have also always been recognized as peace officers. Among the duties given to constables by statute are returns on service, LSA-R.S. 15:30; preserving the peace, LSA-R.S. 13:2586.1; the report of crimes, LSA-R.S. 15:578;[3] and the seizure and sale of property, LSA-R.S. 13:2585. Smith reported to the scene of this accident in his official capacity as an

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[3] Prior to the effective date of Act 722 of 1979.

elected official of the State of Louisiana. He was not there as a private citizen.

When a constable is acting in his capacity as a public officer, the State of Louisiana is liable for a tort resulting from his negligent performance of an official duty. Constable Smith was at the scene of this accident in discharge of the duties of his office. Therefore, the State of Louisiana is liable for the negligence of Smith in the course of his employment. *Foster v. Hampton*, 381 So.2d 789 (La., 1980).

Although the State of Louisiana was named as a defendant "Through the Department of Transportation and Development" and "Through the Department of Public Safety", this is sufficient to make the State of Louisiana a proper party defendant. The two departments named as defendants are both agencies of the executive branch of the State of Louisiana. LSA-R.S. 36:4. Any judgment rendered can only be paid by appropriation of the Legislature. LSA-Const. art. 12, §10. The State of Louisiana is the real party at interest. See *Usry v. Louisiana Dept. of Highways*, 459 F.Supp. 56 (1978) and *Dagnall v. Department of Highways, State of La.*, 466 F.Supp. 245 (1979).

The Court of Appeal erred in affirming the directed verdict in favor of the State of Louisiana Through the Department of Public Safety and Through the Department of Transportation and Development. While it is true that the two departments were sued, the State is before the court and the trial court must proceed to determine its liability subject to our holding that the State is liable for the negligence of Smith in the course of his

employment as constable. This pretermits consideration of whether Smith was acting as agent of the two departments.

There is no abuse of discretion in the quantum awarded by the trier of fact. The reduction in quantum by the Court of Appeal must, of course, be vacated pending further trial and the judgment of the trial court reinstated.[4]

For the foregoing reasons, the judgment of the Court of Appeal is affirmed in favor of the Calcasieu Parish Police Jury and the Calcasieu Parish Sheriff's Department and their insurers. The judgment of the Court of Appeal is reversed insofar as it affirmed the directed verdicts in favor of the State of Louisiana, Through the Department of Public Safety, and the State of Louisiana, Through the Department of Transportation and Development. The judgment of the Court of Appeal reducing the quantum of damages is vacated and set aside. The judgment of the trial court in favor of plaintiff against Smith and Clifton and their insurers is affirmed but it is ordered that there be further trial on the issue of

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[4] The trial court observed that the disparity here between damages and ability to pay is so great that the two cannot be meaningfully reconciled:

> "The court finds that the 'inability to pay' rule is functional only when there is a common ground which can be reached between the damages due a claimant and the financial abilities of the defendant. * * * For these reasons the inability of the defendants to respond in damages is not considered to be applicable and will not be used by the court to reduce the amount of the award." (Tr. 545)

the liability of the State of Louisiana.[5] The question of the liability of State Farm in its capacity as Hryhorchuk's uninsured motorist carrier remains open pending further disposition in the trial court.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Marcus, J., concurs in part and dissents in part and assigns reasons. Blanche, J., dissents and hands down reasons. Lemmon, J., dissents in part as to dismissal of Parish of Calcasieu.

MARCUS, Justice (concurring in part and dissenting in part). I agree with all the findings of the majority except the conclusion that a constable is a state officer for whom the state would be liable for damages resulting from the negligent performance of his duties. Accordingly, I concur in part and dissent in part.

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[5] This judgment is, like that of the trial court, "subject to the rights of the intervenor Lawanda Hryhorchuk, if any". (Tr. 551).

Supreme Court of Louisiana

Nos. 67,014, 67,021 AND 67,027
ROY HRYHORCHUK
VERSUS
ROY M. SMITH, ET AL
AND
ROY HRYHORCHUK
VERSUS
CALCASIEU PARISH POLICE JURY, ET AL

BLANCHE, Justice (dissenting)

I respectfully dissent. The evidence indicates that upon his arrival, Smith noted that there were two accidents—one on either side of the road. After surveying the situation, he decided to divert traffic around the Thompson truck, fearing that east-bound traffic would, upon seeing the truck sitting on the edge of the road, tend to "flinch from that truck" and run into the west-bound traffic. This conclusion is far from being a mere "figment of one's imagination". The second accident occurred due to an emergency created by an automobile travelling normally in the east-bound traffic lane suddenly and without warning putting on its brakes and swerving on the highway at the point where the truck was straddling the bridge railing.

Although, upon after-the-fact reflection by the trial judge, in chambers, Smith's efforts to divert traffic may not have been necessary nor, in his opinion, the best course of action, negligence is not proved simply because a subsequent review of the facts would suggest a better and safer course of action. *Hickman v. So. Pacific*

Transport Co., 262 La. 102, 262 So.2d 385 (1972). But hindsight is always blessed with 20/20 vision. The law simply requires that one act reasonably and prudently under the circumstances, not that one take the best course of action. Therefore, in light of the circumstances surrounding the two accidents and the duty placed on Constable Smith to protect the safety of other motorists using the highway, I would conclude that his on-the-spot decision to block and re-route traffic was reasonable.

Smith's actions, however, did create an obstacle, and he did owe a duty to warn passing motorists of the obstruction on the highway. See La. R.S. 141(c). The evidence adduced at trial showed that Smith turned on his emergency blinking lights, placed a flashing red "Kojak" light atop his car and used a flashlight to flag down traffic. Mr. Ellis was positioned further down the road waving down traffic with a 6-volt lantern. Considering the various signalling devices employed by Smith, we conclude that he properly discharged his duty to warn oncoming traffic of the obstacle. See *Stevenson v. Delahaye*, 310 So.2d 651 (La. App. 1st Cir. 1975); *Rowe v. Travelers Ins. Co.*, 253 La. 659, 219 So.2d 486 (1969).

For these reasons, this writer is unable to find that Roy Smith should be found liable for the accident. Beyond a shadow of a doubt, it was Clifton's negligence that was the sole and only cause of the accident. As all admit, he failed to observe the warning lights, the activities on the bridge, the activities of Ellis in attempting to flag him down with a lantern, the congestion of the cars on the shoulder of the road, and failed to bring his vehicle under such control as was necessary to avoid the

accident. Clifton just failed to see what he could and should have seen, and he was the sole cause of plaintiff's injuries.

* * *

Supreme Court of Louisiana

Nos. 67,014, 67,021 AND 67,027
ROY HRYHORCHUK
VERSUS
ROY M. SMITH, ET AL
AND
ROY HRYHORCHUK
VERSUS
CALCASIEU PARISH POLICE JURY, ET AL

December 5, 1980

ON APPLICATION FOR REHEARING

PER CURIAM.

In applying for rehearing, the State of Louisiana, through the Attorney General and through the State agencies, has argued that this court should order plaintiff to amend to name the State of Louisiana as party defendant. The opinion of this court held that the State of Louisiana was and is a party defendant. This resulted from plaintiff suing the two State agencies. However, there is nothing to preclude the Attorney General making an appearance on behalf of the State.

The defendants, Roy M. Smith and State Farm Mutual Automobile Insurance Company, have applied for rehearing contending that their third party demands against the State of Louisiana should be remanded to the trial court for consideration. Since Smith was negligent, he and his insurer are precluded from recovery on their

third party demands and there is no occasion to remand. The trial court judgment dismissing the third party demand of Smith and State Farm is affirmed.

The applications for rehearing are otherwise denied.

Marcus, Blanche and Lemmon, JJ., would grant as to the issue of the responsibility of the state for the acts of the constable; Blanche, J., would also grant as to the liability of the constable.

APPENDIX E

ROY HRYHORCHUK
Plaintiff-Appellant,

v.

ROY M. SMITH ET AL.,
Defendants-Appellees-Appellants

No. 7267.

COURT OF APPEAL OF LOUISIANA, THIRD CIRCUIT.

Dec. 19, 1979.

Writ Granted March 21, 1980.

Before CULPEPPER, GUIDRY and YELVERTON, JJ.

GUIDRY, Judge.

Plaintiff instituted this suit seeking to recover for personal injuries sustained in an accident which occurred in ward five of Calcasieu Parish on April 28, 1976. When the trial of this matter commenced in May of 1978 the following parties were defendant:

(1) Roy M. Smith and his liability insurer, State Farm Mutual Automobile Insurance Company (hereafter, State Farm).

(2) The Calcasieu Parish Police Jury (hereafter, Police Jury) and its comprehensive general liability insurer, United States Fidelity & Guaranty Company (hereafter, USF & G).

(3) The Calcasieu Parish Sheriff's Department (hereafter, Sheriff's Department) and its liabil-

ity insurer, North River Insurance Company (hereafter, North River).

(4) The State of Louisiana, through its Department of Public Safety (hereafter, Department of Public Safety).

(5) The State of Louisiana, through the Department of Transportation and Development, Office of Highways (hereafter, Department of Transportation).

(6) William Clifton and his automobile liability insurer, Pennsylvania General Insurance Company, (hereafter, Pennsylvania General).

(7) State Farm Mutual Automobile Insurance Company (hereafter, State Farm), plaintiff's uninsured motorist carrier.

Subsequent to the commencement of trial plaintiff learned that there were additional liability insurers of the Police Jury, i.e., Travelers Insurance Company (hereafter Travelers) and Houston General Insurance Company (hereafter Houston General) and a liability insurer of the Department of Public Safety, Travelers Insurance Company. Upon securing this knowledge, plaintiff offered to file a supplemental petition naming these insurers as additional parties defendant. The trial court refused to allow the filing of this supplemental petition. Because of scheduling difficulties the case was only partially tried in May of 1978 and rescheduled for completion in November of 1978. On August 3, 1978, plaintiff filed an additional suit seeking a declaratory judgment holding that Roy M. Smith was an insured under the policies of insurance issued by Travelers and Houston General to the Police Jury and the policy issued by Trav-

elers to the Department of Public Safety. This suit entitled, *Roy Hryhorchuk v. Calcasieu Parish Police Jury et al.*, La. App., was consolidated for purposes of trial with this matter.

Almost simultaneous with the filing of the declaratory judgment suit, Roy M. Smith filed a third party demand in the first suit against the Police Jury, the Department of Public Safety, the Sheriff's Department, the Department of Transportation, and their respective insurers. The trial court allowed the filing of the third party demand against all defendants except Travelers. Trial of the consolidated matters resumed in November of 1978. At the close of the plaintiff's case the trial court sustained several motions for directed verdicts and dismissed plaintiff's petition for a declaratory judgment and also dismissed all of plaintiff's demands against the Police Jury, USF & G, the Sheriff's Department, North River, the Department of Public Safety and the Department of Transportation, as set forth in the initial suit. Thereafter, the trial continued against the remaining defendants and on the third party demand of Smith, resulting in a judgment as follows:

(a) in favor of plaintiff and against defendants, Roy M. Smith, William Clifton, State Farm and Pennsylvania General, in solido, for $40,000.00 (the limits of liability of the policies issued by State Farm and Pennsylvania General);

(b) in favor of plaintiff and against Smith and Clifton, in solido, for the sum of $587,389.24; and,

(c) dismissing all incidental and third party demands

excepting the demand of intervenor, Lawanda Hryhorchuk, plaintiff's wife, who separate in property as a result of a judgment of separation and board, had intervened seeking a share of plaintiff's recovery.

Following rendition of judgment State Farm and Pennsylvania General deposited their respective limits of liability with interest in the registry of court. Judgment was rendered allowing the deposit in full satisfaction of the judgment rendered against the insurers.

Plaintiff and defendants, Roy M. Smith, State Farm, William Clifton, and Pennsylvania General, appealed. Appeals were likewise taken in the declaratory judgment suit, which bears our docket number 7268, in which matter we this day render a separate decree.

Appellants made several specifications of error which are summarized as follows:

(1) The trial court erred in finding Roy M. Smith negligent and his alleged negligence a proximate cause of the accident.

(2) The trial court erred in finding William Clifton negligent and his alleged negligence a proximate cause of the accident.

(3) The trial court erred in failing to find Roy Hryhorchuk guilty of contributory negligence.

(4) The trial court erred in failing to find that Roy M. Smith was an executive officer, employee, and/or direct agent or representative of either, all, or any combination of the following: the Police Jury; the Sheriff's Department; the Department of Public Safety; and, the Department of Transportation.

(5) The trial court erred in failing to find that Roy M. Smith was a legally commissioned deputy sheriff of Calcasieu Parish.

(6) The trial court erred in failing to find that Roy M. Smith was an insured under either, all, or any combination of the policies of insurance issued to the entities names in subsection (4) above.

(7) The award made by the trial court for lost wages and loss of future wages is excessive.

(8) The trial court erred in refusing to consider the inability of the individual defendants to respond in judgment in fixing the award.

The trial judge rendered written reasons for judgment in which he sets forth the facts surrounding the accident which precipitated the filing of this law suit. We have carefully reviewed the voluminous record in this case and find that, except for minor discrepancies explained in footnotes, the trial judge's written reasons, which we quote, clearly and accurately set forth the factual setting.

> "On April 27, 1976 ROY HRYHORCHUK was severely injured in an unusual accident. This accident occurred when WILLIAM R. CLIFTON, driving a 1976 Dotson (sic) pick-up truck, collided head-on with an automobile owned by ROY SMITH, and parked in the highway by Smith. The occurrence was on Highway #12, in the western part of Calcasieu Parish.
>
> Hryhorchuk filed suit against Clifton, Smith, their respective insurers, and his own insurer, who had issued him two policies with uninsured motorist's coverage.

The insurance picture is as follows:

INSURED	INSURER	LIMITS
William Clifton	Pennsylvania Insurance Co.	$10,000.00
Roy M. Smith	State Farm Mutual Automobile Insurance Company	$10,000.00
Roy Hryhorchuk (Uninsured Motorist)	State Farm Mutual Automobile Insurance Co. (2 policies)	$20,000.00

Although a number of defendants were included in this action earlier, all, save the defendants listed above, have been dismissed by the court.

A discussion of the facts, and how the court arrived at these facts, follows:

On the night of the accident, Hryhorchuk had been visiting with his family in Texas. That evening, on his way back home he passed over a bridge on Highway #12 and noticed a pick-up truck straddling the bridge railing off of the roadway.[1] Hryhorchuk recognized the truck as belonging to a friend of his, one Huey P. Thompson. He also saw Thompson sitting on the railing. Hryhorchuk continued home, let off his wife and children, and returned to the bridge to see if Thompson needed any assistance. While

[1] The record reflects that the truck was actually straddling the guard rail, located on the south shoulder of La. 12, on the approach to the bridge. The guard rail, from its western terminus to its connection with the bridge abutment measured 99′. At its western terminus the guard rail is 6½′ from the pavement edge but it curves and gradually approaches the pavement edge until at the bridge abutment it is flush with the pavement edge. The record further reflects that the truck was astride the guard rail some 60′ or 70′ west of the bridge.

Hryhorchuk was on his way back to the bridge, the next event, in what was to be a strange sequence, occurred.

Curtis R. Bartel was also driving Highway #12 in route from Texas. He was being followed by a friend in another automobile, whose name was Ricky Marcantel. As Bartel approached the bridge, he found that he had to swerve abruptly to miss an automobile coming from the opposite direction.[2] This sudden maneuver confused his friend, Marcantel, and Marcantel temporarily lost control of his automobile and struck the guard railing.

This was a minor accident and the occurrence of this accident itself is disconnected with the fact that the pick-up truck was lodged on the guard rail. While there may be some argument that this would be a strange coincidence, a closer view of Bartel's testimony and all other facts show that there was no connection between the position of Huey Thompson's pick-up and Ricky Marcantel's accident. The importance of this determination will be seen later on.[3]

William Chapman, on the night of the accident, was an employee with the Department of Transportation and was on duty at a weigh station off of Highway #12, some four miles east of the bridge under discussion.[4] About 9:30 P.M. on that night he

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[2] The record reflects that Bartel swerved to avoid a car which he was following whose driver for some reason swerved and applied his brakes (Tr. pg. 1651).

[3] Following this occurrence the Bartel and Marcantel vehicles were turned around and driven onto the north shoulder of La. 12 some distance west of the bridge.

[4] Actually the record reflects that the weigh station is located about ½ mile east of the bridge under discussion although it is approximately 4 miles east of the Sabine River bridge.

learned of an accident on the bridge from a passing trucker. He radioed Louisiana State Police Headquarters at Troop D. He was requested by the dispatcher there to have a 'stand by' to flag traffic because of the time it would take before a trooper could arrive. Chapman first called the Sheriff's Department and evidently no Deputy was readily available. He then called Roy Smith. The reason that he call [sic] Smith next is because Smith was the Constable for Ward 5, which was the Ward of Calcasieu Parish in which this was all happening.

Smith lived about six miles from the accident site and drove on over at Chapman's request.

When he arrived, he first saw Thompson's truck sitting on the bridge railing. He then observed a car on the north shoulder west of the bridge, probably the Marcantel vehicle, and he determined that there had been two accidents.

Now the next unusual thing in this sequence occurred. Rather than parking his vehicle on the shoulder of the road, Smith decided to park it in the eastbound lane traffic, facing west. The point he selected was somewhere in the middle of the bridge,[5] close by the Thompson vehicle.

Smith turned off the head lights of his car, but turned his emergency blinkers on. In addition, he reached on top the car and placed a 'Kojak' light. This is a single incandescent bulb with a flashing mechanism, and covered with a red-tinted plastic cover. He raised the hood of his automobile a few inches, in order to allow the engine to remain cool because his motor was left running to supply power

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[5] When the trial judge refers to the "middle of the bridge" he speaks of the middle of the approach to the bridge. See footnote 1.

for the emergency blinkers and the flashing light.

In the meantime Hryhorchuk had already arrived at the scene. He had engaged Thompson in some conversation, and because Thompson's attitude was uncooperative, Hryhorchuk was in some kind of dilemma. He did not want to leave his friend but he wanted to go back home.

While he was mulling over this problem, he was standing off of the roadway in the front of Thompson's truck. This would place Hryhorchuk somewhat behind Smith's automobile. Several other people were sitting on the guard rail and Smith and Bartel were standing somewhere near the front of Smith's automobile.

Down the road, Aaron Ellis was waving traffic down with a six-volt hand lantern. Ellis had come upon the scene and decided to assist in this manner. He had taken a position about 100 feet west of the bridge, had parked his automobile off on the shoulder, and had been successful in alerting about ten vehicles of the problem at the bridge.

William R. Clifton had traveled Highway # 12 many times. On the night in question he was also coming from Texas. Between 2 and 2½ miles from the bridge, Clifton saw a red blinking light. Presumably, it was the light on Smith's car. But as he approached the bridge site he does not remember seeing it again. In his mind he thought that what he had seen was the caution light, which is near the weigh station some four miles further on down the road.[6]

Ellis waved his light at Clifton and upon realiz-

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[6] See footnote 4 as concerns respective locations of the bridge and weigh station.

ing that Clifton was not going to stop, moved off of the roadway out of the path of car. About this time someone yelled something like: 'He's not stopping!'. The testimony indicates that it was probably Ellis who gave this verbal warning.

Smith and Bartel saw the danger and scooted out of the way. Clifton did not become aware of the Smith vehicle directly in his roadway until a car length or so away. The two vehicles met in a frontal impact and the Smith automobile hurdled (sic) backwards, striking Hryhorchuk and knocking him over the embankment and into the ravine below. Hryhorchuk sustained injuries which will be discussed at length in a subsequent section."

With the foregoing facts in mind we proceed to a consideration of the several specifications of error raised by appellants.

NEGLIGENCE OF ROY M. SMITH

The trial judge concluded that Smith was negligent in parking his automobile so as to completely block the east bound lane of La. 12 and that this negligent conduct was a proximate cause of the accident and the injuries sustained by plaintiff. In reaching this conclusion the trial judge points to the fact that the parking of his automobile in the highway served no useful purpose as the Thompson pick-up truck was well off of the road and presented no obstacle or danger to the flow of traffic.

The record fully supports the trial judge's finding that the Thompson vehicle was well onto the south shoulder of the road and presented no danger to oncoming traffic. This being considered and considering further that it was well after dark and the only devices

available for warning oncoming motorists were the blinkers on the Smith car and a small "Kojak" light we agree that Smith's conduct was negligent and a proximate cause of the accident.

LSA-R.S. 32:141 makes it unlawful to park or leave standing any vehicle, whether attended or unattended, upon the paved or main traveled part of the highway when it is practicable to stop, park or leave such vehicle off such part of the highway. In speaking to the duty imposed by the cited statute our brethren of the Fourth Circuit in *Haas v. Southern Farm Bureau Casualty Insurance Company*, 321 So.2d 380 (La. App. 1975), writ refused, La., 323 So.2d 133, stated:

> ". . . The duty to refrain from parking on a highway is imposed as a safety measure in order to keep traffic arteries open. The obstruction of highways not only impedes passage, but also creates a risk that a confused or inattentive driver will collide with the stationary vehicle. The risk of harm created by a motorists's obstructing a highway imposes a reciprocal duty on motorists to refrain from doing so." (footnote omitted)

In seeking to justify his actions, Smith suggests that at the time of the accident he enjoyed the status of the driver of an emergency vehicle and in the alternative that his negligent conduct is excusable because he enjoyed the status of a rescuer. We find merit in neither of these contentions.

Although LSA-R.S. 32:24 permits the driver of an authorized emergency vehicle to "park or stand" on the main traveled part of the highway such privilege is subject to the specific statutory condition that it will be

exercised with due regard for the safety of others. The fault arising from the conduct of the driver of an emergency vehicle is excusable under the cited section only if the action taken is not unreasonable and is reasonably required by the situation of the emergency. In *Sullivan v. Hartford Accident & Indemnity Company*, 155 So.2d 432 (La. App. 2nd Cir. 1963), writ refused 245 La. 64, 156 So.2d 604, the court singled out two factors which should be considered in determining whether a particular dangerous act of a driver of an emergency vehicle is excusable:

> "(1) The inherent danger of the act of the driver; (2) Whether the dangerous act was necessary to the performance of the emergency function."

When these two factors are considered it immediately becomes apparent that Smith can derive no comfort from the provisions of LSA-R.S. 32:24 for his act in completely blocking the east bound lane of the highway in question, after dark, was inherently dangerous and unnecessary to the performance of the emergency function.

Further, in our opinion, these principles are equally applicable to one who seeks to avoid liability for his own negligent conduct claiming the status of a rescuer. See *Hebert v. Perkins*, 260 So.2d 15 (La. App. 4th Cir. 1972); *Miller v. Carter*, 346 So.2d 748 (La. App. 1st Cir. 1977); cf. *Chastian v. Allstate Insurance Co.*, 212 So.2d 243 (La. App. 2nd Cir. 1968).

We find no error in the trial court's conclusion that on the occasion in question Roy M. Smith was negligent and his negligent conduct a proximate cause of the accident.

NEGLIGENCE OF WILLIAM CLIFTON

In disposing of this issue the trial court stated:

"A night traveling motorist, in good weather and on a good road, is not expected to drive with such caution as to anticipate unusual obstructions in the highway. To determine whether or not a night driver is negligent in striking such an object, the whole of the circumstances surrounding the incident must be examined, and the broad requirement of reasonableness must be applied.

In the instant case, the object in the road, the Smith vehicle, was stationery and in the middle of Clifton's lane of traffic. That Smith's emergency blinkers were on and visible to Clifton is not disputed. Whether or not the 'Kojak' light was visible to Clifton, has been disputed.

It has been suggested that the hood on the Smith automobile obstructed the view of the flashing light for traffic coming from the west. It is the testimony of all who saw the raised hood, that it was not high enough to cause this visual obstruction. The argument that the hood perhaps 'worked up' because the engine was running is speculation not based on any evidence. The court finds that as a matter of fact, the flashing red light should also have been visible to Clifton.

An additional circumstance is that Aaron Ellis, using the hand lantern some 100 feet to the west, tried to slow Clifton.

A review of all the circumstances leads the court to the conclusion that Clifton, as a reasonable and prudent driver under these circumstances, should have been alerted by the various warning lights, activities on the bridge, and congestion of

cars on the shoulder, to have brought his automobile into such control as to have stopped if something were in the roadway. To the contrary, the testimony discloses that he reduced his speed very little, if any. The court finds that William Clifton is also guilty of proximate negligence leading to the injuries sustained by Hryhorchuk."

The standard of care of the nighttime driver is one based upon the broad requirement of reasonableness. *Craker v. Allstate Insurance Company*, 259 La. 578, 250 So.2d 746 (La. 1971). The trial court considered the evidence in light of this standard and concluded that William Clifton was negligent and that his negligence was a proximate cause of the accident. We find no manifest error in this holding.

CONTRIBUTORY NEGLIGENCE OF HRYHORCHUK

The trial court held that the plaintiff Hryhorchuk was free from any negligence. The evidence in the record makes clear that at the time of accident plaintiff was well off of the traveled portion of the highway. There is nothing in the record which would suggest that he was guilty of any negligent conduct which could in any way have contributed to the accident or to his injuries. In any event, a careful study of the recent case of *Baumgartner v. State Farm Mutual Auto Ins. Co.*, 356 So.2d 400 (La. 1978) makes clear that contributory negligence is no longer a defense to a pedestrian's claim for damages sustained due to the negligence of a motorist.

AT THE TIME OF ACCIDENT WAS ROY M. SMITH AN EXECUTIVE OFFICER, EMPLOYEE, AND/OR AGENT OF EITHER, ALL,

OR ANY COMBINATION OF THE FOLLOWING: THE POLICE JURY, THE SHERIFF'S DEPARTMENT, THE DEPARTMENT OF PUBLIC SAFETY, AND THE DEPARTMENT OF TRANSPORTATION?

The trial court concluded that at the time of accident Smith was neither the employee, agent or executive officer of any of the entities named above. We agree.

In the recent case of *Savoie v. Fireman's Fund Insurance Company*, 347 So.2d 188 (La. 1977) our Supreme Court set forth succinctly the criteria for the finding of an employee-employer relationship. Specifically, the court stated:

> ". . . the word 'employee' understood in its common and usual sense, signifies one who is a party to an employement contract, express or implied.
>
> In determining whether an employment relationship exists . . . the jurisprudence of this state has uniformly held that the most important element to be considered is the right of control and supervision over an individual. *Hickman v. Southern Pacific Transport Co.*, 262 La. 102, 262 So.2d 385 (1972); *Blanchard v. Ogima*, 253 La. 34, 215 So.2d 902 (1968). Factors to be considered in assessing the right of control are the selection and engagement of the worker, the payment of wages and the power of control and dismissal. *Dauzat v. Crites*, 237 So.2d 697 (La. App. 4th Cir. 1970); *Wambles v. State*, 283 So.2d 331 (La. App. 4th Cir. 1973); *Trahan v. State*, 158 So.2d 417 (La. App. 3rd Cir. 1963). Moreover, La. Civil Code art. 2669 provides that:
>
> '. . . (H)ire is a synallagmatic contract, to which consent alone is sufficient, and by which one

> party gives to the other the enjoyment of . . . his labor, at a fixed price.'"

Considering the above the evidence makes crystal clear that at the time of accident no employee-employer relationship existed between Smith and any of the entities above named. There was no synallagmatic contract existing between them. None had selected or engaged him for employment. None had supervision or right of control over him and none had the power to dismiss him. None except, the Parish of Calcasieu, contributed to the payment of his wages. The fact that Roy M. Smith was the duly elected Constable of Ward 5 of Calcasieu Parish at the time of accident and that the Parish of Calcasieu paid the greater part of his salary did not have the effect of making Smith an employee of the Police Jury.

It is well settled that a "state office" is one created by the constitution or state statute. *State v. Dark*, 195 La. 139, 196 So. 47 (La. 1940); *State v. Titus*, 152 La. 1011, 95 So. 106 (La. 1922); *Chappuis v. Reggie*, 222 La. 35, 62 So.2d 92 (La. 1952). The office of Constable is a creature of the legislature. LSA-R.S. 13:2581.[7]

In the rather recent case of *Cosenza v. Aetna Insurance Company, et al.*, 341 So.2d 1304 (La. App. 3rd Cir. 1977), we considered the issue as to whether the Parish of Rapides was vicariously responsible for the actions of the Clerk of the City Court of Pineville, Louisiana. In concluding that the Parish of Rapides was not legally liable for acts of the Clerk of the City Court we stated:

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[7] This section was continued as a statute from La. Const. of 1921, Art. 7, Sec. 49.

"Although the Parish of Rapides contributes to the salaries of both the city judge of the Pineville City Court and his employee, the city court clerk, we are of the opinion that the relationship between the Parish and the Judge (and his clerk) terminates at that point. The City Court and the office of City Judge are created by legislative act based upon authority derived from the state constitution. As such, the city judge is a state officer and the police jury of Rapides Parish or any other executive body at that level is powerless to interfere with or direct the activities of the court.

In the case of State ex rel. *Bass v. Mayor and Board of Aldermen of City of Oakdale*, 204 La. 940, 16 So.2d 527 the city council attempted to eliminate the office of city marshall (created by the Legislature) by drastically reducing that officer's salary. The Supreme Court held that when the Legislature has created an office a city council cannot nullify or abolish it by any direct or indirect means.

In cases involving the operations of sheriffs' departments our courts have held that a police jury or parish has no authority to interfere with the operations of a sheriff's department, the latter being a constitutionally created office. See *Wood v. Maryland Casualty Company*, 322 F.Supp. 436 (D.C.La. 1971) (Western District of Louisiana), and *State ex rel. Police Jury of Parish of Vernon v. Davis*, 120 La. 862, 45 So. 838 (La. 1980).

Following that principle, the logical conclusion was stated in *Nielson v. Jefferson Parish Sheriff's Office*, 242 So.2d 91 (La. App. 4th Cir. 1970):

> 'The court is of the opinion that as a matter of law, the Parish of Jefferson exercises no power or discretion in the functioning of the Jefferson

> Parish Sheriff's Office. The Sheriff's Office is a constitutional office, LSA-Const. Art. 7 § 65. It exists and functions independently of the governing body of the Parish. LSA-Const. Art 14 §3(c). Therefore there can be no vicarious liability on the part of the Parish of Jefferson for the acts of the Sheriff of Jefferson or any of his deputies.'

See also the separation of powers doctrine embodied in LSA-Const. 1974, Art. 2, Sec. 1.

> Likewise, we are of the opinion that the Parish of Rapides exercises no power or discretion in the functioning of the City Court of Pineville, Louisiana. Thus, we fail to see how vicarious liability whatsoever exists on behalf of the Parish of Rapides for alleged tortious conduct of an employee of the constitutionally and statutorily created City Court of Pineville. Simply stated, the City Judge is a state officer, and the Clerk is his employee. The Parish of Rapides is not an employer or master of the City Court as alleged in the City of Pineville's petition. Ergo the Parish of Rapides is, under no theory, responsible for the actions of the Judge of the City Court of Pineville or those of his employees."

In the recent case of *Foster v. Hampton*, 352 So.2d 197 (La. 1977) the Supreme Court refused to hold a local governmental entity (East Baton Rouge Parish) liable for the alleged tortious acts of a state officer (deputy sheriff). In *Foster*, supra, after concluding that a deputy sheriff is an officer of the state, the court quoted approvingly from the court of appeal opinion which rejected plaintiff's demand against the Parish as follows:

> "The Court is of the opinion that as a matter of law, East Baton Rouge Parish exercises no power or dis-

> cretion in the functioning independently of the governing body of the Parish. La. Const. of 1974, art. 5, Sec. 27. There can be no vicarious liability on the part of the parish for the acts of the sheriff or his deputies. See *Nielson v. Jefferson Parish Sheriff's Office*, supra, at page 94 [242 So.2d 91 (La. App. 4th Cir. 1970)]."

In support of their contention of error appellants rely on the case of *Honeycutt v. Town of Boyce*, 341 So.2d 327 (La. 1976) suggesting that the holding of that case is to the effect that a local government entity is liable for the torts of a state officer and that liability does not depend on the amount of control exercised by the local government over such state officer. We disagree with plaintiff's analysis of that decision. In *Honeycutt* the employee-employer relationship between Hillman (Town Marshall) and the Town of Boyce was assumed rather than addressed. In that case the court simply held that the trial court erred in sustaining an exception of no cause of action, where, according to the pleadings, plaintiff complained of injury caused by the negligence of Honeycutt when the latter was performing duties incident to his employment with the Town of Boyce.

We conclude that the principles of law recently reiterated by this court in *Cosenza* supra, and by our Supreme Court in *Foster*, supra, are applicable to the circumstances of this case. The office of constable is a state office created by act of the legislature. Although the Parish constributes to the salary of the constable, it has no power, authority or discretion in the functioning of that office. Accordingly, as a matter of law, the Parish of Calcasieu is not vicariously liable for the delicts of Constable Smith.

Neither does the evidence in the record reflect that at the time of accident Roy M. Smith was acting as an agent or direct representative of any of the entities above named.[8] An agent may be defined as one who acts for or in the place of another by authority from him. LSA-C.C. Articles 2985, 2986, 2992; 2 C.J.S. Agency § 1c, pgs., 1023-1025. *Downs v. Delco-Light Co.*, 175 La. 242, 143 So. 227 (La. 1932). There is no evidence in the record which would even suggest that Smith, at the time of accident, was acting as an agent or representative of any of the governmental entities above named or that he had any authority verbal or otherwise to do so. Smith simply went to the accident scene as the Constable of the 5th Ward of Calcasieu Parish upon being advised by a Department of Transportation employee that an accident had occurred on the bridge. It is inconceivable that as a result of this call, from a weigh station employee at the request of the dispatcher who suggested that he get someone to "stand by", Smith became the agent or direct representative of the Police Jury, the Sheriff's Department, the Department of Public Safety and the Department of Transportation.

Finally, we observe in connection with this specification of error that obviously Smith did not enjoy executive status with any of the named entities.

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[8] Appellants suggest that such a relationship existed between Smith and all or one of the named entities so as to bring Smith within the definition of an insured under the policies of insurance issued to such entities, not for the purpose of holding the entity itself vicariously liable. See *Blanchard v. Ogima*, 253 La. 34, 215 So.2d 902 (1968).

DID THE TRIAL COURT ERR IN FAILING TO FIND THAT ROY M. SMITH WAS AN INSURED UNDER EITHER, ALL OR ANY COMBINATION OF THE POLICIES OF INSURANCE ISSUED TO THE GOVERNMENTAL ENTITIES MADE DEFENDANT?

In rejecting appellants' demands against the several insurers the trial court stated:

> " . . . Each of these policies provides that the responsibility of the company, the insurance company, is to pay for or to reimburse a named insured for specified legal liabilities. There were some special categories of persons other than named insureds for whom coverage is provided, but they were very limited, and Roy Smith did not fall within any of these particular special categories. Considering that the court has held above that the insureds cannot be liable in this matter, it follows that the insurers cannot be liable." (Tr. pgs. 1624 and 1625)

We agree that unless Roy M. Smith falls within a special category of persons for whom coverage is provided under the several policies, that there is no coverage. It is well settled that is there is no liability on the part of the insured, there can be no liability on the part of the insurer under its policy. *Smith v. Kelly Labor Service*, 239 So.2d 685 (La. App. 4th Cir. 1970), writ ref. 257 La. 173, 241 So.2d 531 (La. 1970); *Foster v. Hampton*, supra.

The special categories of persons, of which the trial judge spoke, include executive officers, directors, stockholders, employees, agents or direct representatives. In addition the policy issued by North River covers "each legally commissioned Deputy Sheriff" and the policy is-

sued by USF & G covers "Policemen". We have previously demonstrated that Smith, at the time of accident was not an executive officer, employee, agent or direct representative of any of the governmental entity insureds.

Appellants suggest that Smith was a "legally commissioned Deputy Sheriff" and as such an insured under the North River policy, because at the time of accident he possessed an honorary commission as such. We find no merit in this contention. Being possessed of an honorary commission as a deputy sheriff is simply what the term implies, i.e., designating an office or position held as an honor only without service or pay. The North River policy grants coverage only to a "legally commissioned deputy sheriff". One holding an honorary commission as a deputy sheriff is not a "legally commissioned deputy sheriff". Accordingly there is no coverage for Smith under the North River policy.[9]

Nor do we find coverage for Smith under the USF & G policy which provides coverage for the general category "policemen". The category can only be considered to cover "policemen" for whom the insured has some responsibility. We have concluded that the Parish of Calcasieu has no power, authority of discretion over the

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[9] Since we conclude that the trial court did not commit error in dismissing plaintiff's suit as against the Calcasieu Parish Sheriff's Department and North River, we do not consider nor pass upon the Sheriff Department's exception of no cause of action, filed in this court, to the effect that the "Calcasieu Parish Sheriff's Department" is not a legal entity and cannot be sued as such. *Liberty Mutual Ins. Co. v. Grant Parish Sheriff's Department*, 350 So.2d 236 (La. App. 3rd Cir.), writ denied 352 So.2d 235 (La. 1977).

office of constable and bears no responsibility for his actions while in the performance of his duty. Since the insured is not liable there can be no liability on the part of the insurer. To decide otherwise would expose the insurer to liability for the delicts of all persons who might fall within this general category who keep order, detect crime, etc., regardless of their employment affiliation. This we decline to do.

IS THE TRIAL COURT'S AWARD EXCESSIVE?

Appellants, Smith and Clifton, urge that the award by the trial court for lost wages and future loss of income is excessive and not supported by the evidence. Additionally, they contend that the total award is excessive and should be reduced because of appellant's inability to respond in judgment.

The trial court awarded plaintiff the total sum of $627,389.24, which includes general damages in the amount of $100,000.00 and special damages totaling $527,389.24. The special damage awarded includes loss of past wages fixed at the sum of $31,929.71; future loss of income, fixed at the sum of $471,209.33; and, medical expenses of $24,249.56. The total insurance avaliable from all sources amounts to the sum of $40,000.00 which results in a personal judgment against Smith and Clifton, in solido, for the sum of $587,389.24 with legal interest from date of judicial demand until paid.

Upon trial of this matter Smith and Clifton presented uncontradicted evidence concerning their ability to respond in judgment. The evidence presented by Smith reflects that he is a 56 year old married man. He is presently employed as a janitor at the DeQuincy High

School earning a gross salary of $142.80 per week. In addition to his salary as a janitor, Smith receives $150.00 monthly as constable. Smith's assets include a $600.00 savings account, a boat and motor valued at $500.00 and 7½ acres and a modest home with a total estimated value of $7000.00.

William Clifton is 27 years old, married and the father of one child. He is employed by Kansas City Southern as a railroad engineer and earns $8.00 per hour. His assets include his home, a Datsun automobile and a pick-up truck. His present indebtedness on the listed assets amounts to the sum of $55,400.00.

Although the trial court is his [sic] written reasons acknowledged that the award made was "far beyond the reach" of either defendant he concluded that the award should not be reduced because of their impecuniosity stating:

> "The award granted by the court will far exceed the available insurance coverage from the defendant insurance companies. This means that the balance of the award will have to be shouldered by the two individual defendants, Roy Smith and William Clifton. Evidence of the inability to pay a large judgment was introduced by each of the defendants. There is no question in the court's mind that the testimony of each defendant regarding his financial status was correct and that they would be unable to pay the difference between the award and available insurance proceeds.
>
> The decision by the court of the defendants' inability to pay results from a jurisprudential rule of long standing. It was said in *Lacaze v. Horton*, 100 So.2d 252 (La. App. 2nd Cir. 1958):

'It must be borne in mind that this principle is not to completely relieve a defendant of liability for reparation of damages inflicted by his own negligence, nor should it be considered as justifying the reduction in the allowance of damages to a bare minimum.'

Considering the amount of damages which should be allowed to Hryhorchuk, a reduction by this court of that figure to an amount which would be in the financial grasp of the two defendants, would result in an extreme usage of the doctrine which has not be (sic) contemplated by our jurisprudence. The court finds that the 'inability to pay' rule is functional only when there is a common ground which can be reached between the damages due a claimant and the financial abilities of the defendant. As is in this case, when the award is far beyond the reach of the defendant, a reduction down to a point attainable by the defendants would violate the rule voiced by the Lacaze case above. For these reasons the inability of the defendants to respond in damages is not considered to be applicable and will not be used by the court to reduce the amount of the award."

We believe that our learned trial brother erred and conclude that the award must be reduced.

It is well settled in our law that the financial ability of a defendant to pay is a circumstance which must be considered in assessing an award for damages, both general and special. *Urk v. Southern Farm Bureau Casualty Insurance Company et al.*, 181 So.2d 69 (La. App. 2nd Cir. 1965), writ refused 248 La. 909, 182 So.2d 661 (1966), and authorities therein cited; *Lambert v. Foy*, 224 So.2d 11 (La. App. 1st Cir. 1969); *State Farm Fire &*

Casualty Company v. Drost, 330 So.2d 393 (La. App. 3rd Cir. 1976); *Davis v. Moore*, 353 So.2d 740 (La. App. 4th Cir. 1977) writs refused, La., 354 So.2d 1379 and La., 354 So.2d 1384.

In *Davis*, supra, our 4th Circuit Brethren set forth the origin, theory and application of the rule to be as follows:

> ". . . The 'inability to pay' rule is a creature of jurisprudence dating back to 1898 in *Loyacano v. Jurgens*, 50 La. Ann. 441, 23 So. 717 (1898). Ever since, it has been repeatedly espoused by courts of this state. See 22 Am.Jur.2d Damages §§ 319 and 320. As applied by Louisiana courts, the rule allows evidence of the ability of defendant to respond in damages to be considered in determining the amount of the judgment to be awarded. The theory behind the rule was stated by the court in *Cole v. Sherrill*, 7 So.2d 205 (La. App. 2nd Cir. 1942), cert. denied:
>
> > 'It has never been considered good policy to bankrupt one to pay another even though the award granted is not in line with other cases involving the same injuries and might not fully compensate the plaintiff for the injuries he received. Fair justice between both parties must be arrived at.'
>
> When ability to pay is considered, plaintiff may only be compensated to the degree that it does not impose an undue hardship on the defendant. However, '(a)pplication of the (rule) should not be carried to extremes.' *Smith v. Freeman*, 31 So.2d 524, 526 (La. App. 2nd Cir. 1947). As was so aptly stated in *Lacaze v. Horton*, 100 So.2d 252 (La. App. 2nd Cir. 1958):

> 'It must be borne in mind that this principle is not intended to completely relieve a defendant of liability for reparation of damages inflicted by his own negligence, nor should it be considered as justifying the reduction of the allowance of damages to a bare minimum. Either of these alternatives, in our opinion, would be an extreme application of the principle and would result in effecting a gross injustice toward a plaintiff, under the guise of the application of a humane consideration for the plight of an impecunious defendant' 100 So.2d at 255."

We cannot agree that the "inability to pay" rule is functional only when there is a common ground which can be reached between the damages due a claimant and the financial abilities of the defendant. If the application of the rule were dependent upon such circumstance its purpose would in most cases be frustrated.

We have carefully reviewed the record in light of the legal principles set forth above and, everything being considered, we conclude that a total award to plaintiff, over and above the amount of insurance available, in the sum of $50,000.00 does substantial justice between the parties. Since we determine, for the reasons set forth above, that the award must be reduced we do not consider appellants' remaining assignment of error concerning excessiveness of the award for lost wages, past and future.

For the above and foregoing reasons we amend the judgment appealed from so as to reduce the award in favor of plaintiff, Roy Hryhorchuk, and against the defendants, Roy M. Smith and William Clifton, individually,

jointly, severally and in solido, from the sum of $587,389.24 to the sum of $50,000.00, with legal interest on such sum from date of judicial demand until paid. In all other respects the judgment appealed from is affirmed. Costs of this appeal to be borne by Roy M. Smith, William Clifton, Pennsylvania General Insurance Company and State Farm Mutual Automobile Insurance Company.

AFFIRMED AND AMENDED.

APPENDIX F

14TH JUDICIAL DISTRICT COURT
PARISH OF CALCASIEU
STATE OF LOUISIANA

ROY HRYHORCHUK
VS. NO. 77-1496
ROY M. SMITH, ET AL.

FONTENOT, Judge

On April 27, 1976 ROY HRYHORCHUK was severely injured in an unusual accident. This accident occurred when WILLIAM R. CLIFTON, driving a 1976 Dotson [sic] pick-up truck, collided head-on with an automobile owned by ROY SMITH, and parked in the highway by Smith. The occurrence was on Highway #12, in the western part of Calcasieu Parish.

Hryhorchuk filed suit against Clifton, Smith, their respective insurers, and his own insurer, who had issued him two policies with uninsured motorist's coverage.

The insurance picture is as follows:

INSURED	INSURER	LIMITS
William Clifton	Pennsylvania Insurance Co.	$10,000.00
Roy M. Smith	State Farm Mutual Automobile Insurance Company	$10,000.00
Roy Hryhorchuk (Uninsured Motorist)	State Farm Mutual Automobile Insurance Co. (2 policies)	$20,000.00

Although a number of defendants were included in this action earlier, all, save the defendants listed above, have been dismissed by the court.

A discussion of the facts, and how the court arrived at these facts, follows:

On the night of the accident, Hryhorchuk had been visiting with his family in Texas. That evening, on his way back home he passed over a bridge on Highway #12 and noticed a pick-up truck straddling the bridge railing off of the roadway. Hryhorchuk recognized the truck as belonging to a friend of his, one Huey P. Thompson. He also saw Thompson sitting on the railing. Hryhorchuk continued home, let off his wife and children, and returned to the bridge to see if Thompson needed any assistance. While Hryhorchuk was on his way back to the bridge, the next event, in what was to be a strange sequence, occurred.

Curtis R. Bartel was also driving Highway #12 in route from Texas. He was being followed by a friend in another automobile, whose name was Ricky Marcantel. As Bartel approached the bridge, he found that he had to swerve abruptly to miss an automobile coming from the opposite direction. This sudden maneuver confused his friend, Marcantel, and Marcantel temporarily lost control of his automobile and struck the guard railing.

This was a minor accident and the occurrence of this accident itself is disconnected with the fact that the pick-up truck was lodged on the guard rail. While there may be some argument that this would be a strange coincidence, a closer view of Bartel's testimony and all other facts show that there was no connection between

the position of Huey Thompson's pick-up truck and Ricky Marcantel's accident. The importance of this determination will be seen later on.

William Chapman, on the night of the accident, was an employee, with the Department of Transportation and was on duty at a weigh station off of Highway #12, some four miles east of the bridge under discussion. About 9:30 P.M. on that night he learned of an accident on the bridge from a passing trucker. He radioed Louisiana State Police Headquarters at Troop D. He was requested by the dispatcher there to have a "stand by" to flag traffic because of the time it would take before a trooper could arrive. Chapman first called the Sheriff's Department and evidently no Deputy was readily available. He then called Roy Smith. The reason that he call Smith next is because Smith was the Constable for Ward 5, which was the Ward of Calcasieu Parish in which this was all happening.

Smith lived about six miles from the accident site and drove on over at Chapman's request.

When he arrived, he first saw Thompson's truck sitting on the bridge railing. He then observed a car on the north shoulder west of the bridge, probably the Marcantel vehicle, and he determined that there had been two accidents.

Now the next unusual thing in this sequence occurred. Rather than parking his vehicle on the shoulder of the road, Smith decided to park it in the eastbound land of traffic, facing west. The point he selected was somewhere in the middle of the bridge, close by the Thompson vehicle.

Smith turned off the head lights of his car, but turned his emergency blinkers on. In addition, he reached on top the car and placed a "Kojak" light. This is a single incandescent bulb with a flashing mechanism, and covered with a red-tinted plastic cover. He raised the hood of his automobile a few inches, in order to allow the engine to remain cool because his motor was left running to supply power for the emergency blinkers and the flashing light.

In the meantime Hryhorchuk had already arrived at the scene. He had engaged Thompson in some conversation, and because Thompson's attitude was uncooperative, Hryhorchuk was in some kind of dilemma. He did not want to leave his friend but he wanted to go back home.

While he was mulling over this problem, he was standing off of the roadway in the front of Thompson's truck. This would place Hryhorchuk somewhat behind Smith's automobile. Several other people were sitting on the guard rail and Smith and Bartel were standing somewhere near the front of Smith's automobile.

Down the road, Aaron Ellis was waving traffic down with a six-volt hand lantern. Ellis had come upon the scene and decided to assist in this manner. He had taken a position about 100 feet west of the bridge, had parked his automobile off on the shoulder, and had been successful in alerting about ten vehicles of the problem at the bridge.

William R. Clifton had traveled Highway #12 many times. On the night in question he was also coming from Texas. Between 2 and 2½ miles from the bridge, Clifton

saw a red blinking light. Presumably, it was the light on Smith's car. But as he approached the bridge site he does not remember seeing it again. In his mind he thought that what he had seen was the caution light, which is near the weigh station some four miles further on down the road.

Ellis waved his light at Clifton and upon realizing that Clifton was not going to stop, moved off of the roadway out of the path of car. About this time someone yelled something like: "He's not stopping!" The testimony indicates that it was probably Ellis who gave this verbal warning.

Smith and Bartel saw the danger and scooted out of the way. Clifton did not become aware of the Smith vehicle directly in his roadway until a car length or so away. The two vehicles met in a frontal impact and the Smith automobile hurdled backwards, striking Hryhorchuk and knocking him over the embankment and into the ravine below. Hryhorchuk sustained injuries which will be discussed at length in a subsequent section.

NEGLIGENCE OF ROY M. SMITH

By parking his automobile on the traveled portion of the highway and obstructing the flow of traffic in that lane, Smith violated several well-known traffic rules, some regulatory and some criminal. For the purposes of our discussion, a motorist who parks his automobile upon the traveled portion of a highway is prima facie in violation of the law and to avoid liability for any damages resulting therefrom, the motorist must exonerate himself by bringing his situation into some recognized exception to the rules of the road.

Counsel for Smith suggests that Smith enjoyed the status of the driver of an emergency vehicle at the time of the accident and can justify his actions on that basis.

Revised Statute 32:24 makes certain behavior acceptable for emergency vehicles in order for them to accomplish certain purposes. But Paragraph D of that Statute reads:

> "The foregoing provisions shall not relieve the driver of an authorized vehicle from the duty to drive with due regard for the safety of all persons . . ."

Whether or not Smith was the driver of an emergency vehicle becomes a moot question. It was not necessary for him to park his automobile in the highway and it served no useful purpose. The Thompson pick-up truck was well off of the road and presented no obstacle or danger to the flow of traffic. The Marcante vehicle and the vehicles of other observers were all on the shoulder of the highway.

When one parks an automobile on a rural highway at night, there is a likelihood that a motorist traveling in that lane of traffic will not detect the obstruction in time to safely stop, and that is exactly, in fact, what happened.

Roy M. Smith was negligent and his negligence has a causable connection with the injuries suffered by Hryhorchuk.

NEGLIGENCE OF WILLIAM CLIFTON

A night traveling motorist, in good weather and on a good road, is not expected to drive with such caution as

to anticipate unusual obstructions in the highway. To determine whether or not a night driver is negligent in striking such an object, the whole of the circumstances surrounding the incident must be examined, and the broad requirement of reasonableness be applied.

In the instant case, the object in the road, the Smith vehicle, was stationery and in the middle of Clifton's lane of traffic. That Smith's emergency blinkers were on and visible to Clifton is not disputed. Whether or not the "Kojak" light was visible to Clifton, has been disputed.

It has been suggested that the hood on the Smith automobile obstructed the view of the flashing light for traffic coming from the west. It is the testimony of all who saw the raised hood, that it was not high enough to cause this visual obstruction. The argument that the hood perhaps "worked up" because the engine was running is speculation not based on any evidence. The court finds that as a matter of fact, the flashing red light should also have been visible to Clifton.

An additional circumstance is that Aaron Ellis, using the hand lantern some 100 feet to the west, tried to slow Clifton.

A review of all the circumstances leads the court to the conclusion that Clifton, as a reasonable and prudent driver under these circumstances, should have been alerted by the various warning lights, activities on the bridge, and congestion of cars on the shoulder, to have brought his automobile into such control as to have stopped if something were in the roadway. To the contrary, the testimony discloses that he reduced his speed very little, if any. The court finds that William Clifton is

also guilty of proximate negligence leading to the injuries sustained by Hryhorchuk.

CONTRIBUTORY NEGLIGENCE OF HRYHORCHUK

It has been argued that Hryhorchuk is guilty of contributory negligence and/or assumption of risk in standing on the shoulder of the road at such a position where he would be struck as he was. The evidence is clear that Hryhorchuk was not on the traveled portion of the roadway when he was struck.

It is not pertinent to argue whether or not he had good business to be where he was, because any pedestrian has a right to assume that vehicular traffic will not leave the traveled portions of the highway and strike him. He need not have any business being where he is to be free from negligence. The fact that the Smith vehicle was parked in the roadway near Hryhorchuk does not change that feature, because from his point of view, the lights on the Smith vehicle and the efforts of Aaron Ellis to the west were adequate to protect against any accident in which he could become involved.

The court finds that Hryhorchuk was free from any negligence and that he did not assume any risk barring him from recovery.

QUANTUM

The primary injuries received by Hryhorchuk were compound fractures of the femur and tibia of the right leg. In addition to the extreme displacement of the fractured bones, which were extensively exposed, there was also a loss of skin and much soft tissue damage.

As the Orthopedic Surgeon took steps to repair the bone damage, the task was complicated as the skin of the leg began to die. Hryhorchuk began to develop both soft tissue infection and osteomyelitis, an infection of the bone.

Eventually Hryhorchuk underwent a total of fourteen operations for both bone and skin problems. At one six-week period he lived in a spica cast, which went from his chest to his toes. During other periods of time during these skin graft operations, he had his legs clamped together by use of metal pins running through the bones. The musculature and circulation of his right leg was severely disrupted by the necessary operations and at one point the loss of his leg was a very serious threat.

The healing process which was ultimately experienced was as good as could be expected considering his physical trauma. But even under the best of conditions, the doctor treating him testified that he will suffer from re-occurring swelling, permanently, and he will live with a dormant osteomyelitis, which can flare up at any time and is not always responsive to infection drugs. He will have permanent pain which will increase with weather changes, hard exercise, or prolonged standing. His Orthopedic Surgeon uses the figure of 25% in assessing his disability, but added that he could never again do the strenuous work associated with shipyard welding as he had done before the accident.

Before the accident, Roy Hryhorchuk worked mostly as a welder and usually with Livingston Shipyard. One of his co-workers, C. B. Holmes, was still working at Livingston and was making about $7.50 per

hour. Another one of his co-workers, Donald Locklin, also worked along with Hryhorchuk at Livingston, was earning $10.50 per hour. This last wage had additional benefits which really computed out to $12.40 per hour. It is reasonable to assume that Hryhorchuk would still be working at Livingston Shipyard had he not sustained the injuries which he did.

John W. Chiasson, Ph.D., testified at the trial regarding lost wages. This ex-professor of economics, had impressive credentials and was accepted as an expert by the court to testify in this regard. He noted that Hryhorchuk's earnings for the past four years had been approximately $10,000.00 annually, with the exception that in the year that he was hurt, he would have probably earned $15,000 had he completed the year.

Dr. Chiasson used the $15,000.00 as the base for Hryhorchuk's future earnings in his computations. Using competent statistical data, he testified that using the work life expectancy of Hryhorchuk (who was 34 years old at the time of the accident), he could be expected to work 28.5 years. With anticipated productivity increases of 2.8% annually and price level increases of 4% annually, it could be expected that Hryhorchuk would earn, in his work life, $1,029,120.42.

He admitted that using the base of $10,000.00 annually, which was actually what Hryhorchuk had earned for the four preceding years, then his whole computation should be reduced by about one-third (⅓).

The total amount of Hryhorchuk's earnings if reduced to its present value by using a 5% discount, would be $471,209.93.

George E. Hearn, M.D., qualified before the court as an industrial psychologist and vocational expert. His testimony was in connection of possibilities of gainful employment for Hryhorchuk in ways other than the calling which he followed before his unfortunate accident.

He has submitted Roy Hryhorchuk to several different types of tests, some of which showed intelligence, academic skills, motor skills, and personality factors. He felt that without training Hryhorchuk could work in certain jobs which had light physical demands, such as guards, watchmen, cashiers, and light haul trucking. He felt that with some training Hryhorchuk would also be able to do things like small engine and mechanic repair and light auto mechanic work. He stated that the pay for these jobs was usually minimum wage.

One weakness which the court observed in Dr. Hearn's evaluation, is that he did not test the time endurance of Hryhorchuk, nor did he explore the fact that Hryhorchuk has complained of physical disability resulting from dizziness. Both of these complaints were obvious in Hryhorchuk's testimony and should be considered in evaluating his wage-making ability.

Irving A. Fosberg, Ph.D., termed as an Industrial Psychologist, testified by way of deposition, and the court accepts him as a qualified expert.

He tested Hryhorchuk for several purposes, primarily on his intelligence, psychological adaptability, and manual dexterity. His testing revealed that Hryhorchuk does not have the mental or vocational capacity to make a drastic adjustment for wage earning purposes. He could not adjust successfully to vocations much differ-

ently from that for which he had been employed up to this point in his life.

He further noted that Hryhorchuk could function in the capacity as a bench welder, which is a position requiring the skills of a welder but without the accompanying demands. However, these positions are not numerous and competition for them is rather high. Normally a healthy person with a full range of abilities is selected by an employer for this type of work.

The court feels that the figure of $471,209.93 is as fair a figure as can be arrived at in determining the present value of the lost wages of Roy Hryhorchuk. Although this figure has not been reduced by an estimation of what Hryhorchuk might be able to earn, through light part-time work, the court feels that that reduction would be more than offset by the fact that Dr. Chiasson was very conservative in his formulations and particularly in two respects. First, he used a very low figure for his estimate of price level increases and second, he did not consider the possibility of increased pay for Hryhorchuk resulting from elevations in position.

On the question of pain and suffering the case presented is an extreme one. Hryhorchuk is a semi-invalid today and will always remain so. He has suffered a complete disruption of his work life, his recreational life, and the court feels that it has even contributed to the dissolution of his home life.

He suffered through radical medical treatments, many of which were painful and required extended periods of painful therapy or the extreme discomfort of forced immobilization. He has suffered through the prob-

lems connected with skin grafts and bone marrow transplants. He has lived with splints and braces. His leg has been the source of continuous pain since the accident, and he presently must wear an orthopedic stocking to reduce swelling and keep pain at a minimum.

The court feels that an award of One Hundred Thousand and No/100 ($100,000.00) Dollars for pain and suffering would be proper.

The medical expenses incurred by Hryhorchuk were extensive. The following were documented and are recoverable:

Exhibit P-1,	Our Lady of Lourdes Hospital
Exhibit P-2,	Lake Charles Memorial Hospital (April 28, 1976 - Admission)
Exhibit P-3,	Lake Charles Memorial Hospital (November 2, 1976 - Admission)
Exhibit P-4,	Dr. A. L. Cook
Exhibit P-5,	Bill of D. L. Henderson, M.D.
Exhibit P-7,	Bill of William Akins, M.D.
Exhibit P-25,	Drs. Kent, McCauley & LaBorde
Exhibit P-26,	Drs. Kent, McCauley & LaBorde
Exhibit P-27,	Ray T. Hebert, M.D.
Exhibit P-28,	Ray T. Hebert, M.D.
Exhibit P-29,	Ray T. Hebert, M.D.
Exhibit P-30,	Ray T. Hebert, M.D.
Exhibit P-31,	Lake Charles Memorial Hospital (March 14, 1977 - Admission)
Exhibit P-32,	Lake Charles Memorial Hospital (July 21, 1976 - Admission)

Any doctor bills which includes the cost of giving a deposition or statement will be reduced by that amount. In the judgment to be submitted in connection herewith the exact expense figures are to be calculated from the

stated Exhibits and shown in the said judgment.

The award granted by the court will far exceed the available insurance coverage from the defendant insurance companies. This means that the balance of the award will have to be shouldered by the two individual defendants, Roy Smith and William Clifton. Evidence of the inability to pay a large judgment was introduced by each of the defendants. There is no question in the court's mind that the testimony of each defendant regarding his financial status was correct and that they would be unable to pay the difference between the award and available insurance proceeds.

The decision by the court of the defendants' inability to pay results from a jurisprudential rule of long standing. It was said in *Lacaze v. Horton*, 100 So.2d 252 (La. App.2nd Cir. 1958):

> "It must be borne in mind that this principle is not to completely relieve a defendant of liability for reparation of damages inflicted by his own negligence, nor should it be considered as justifying the reduction in the allowance of damages to a bare minimum."

Considering the amount of damages which should be allowed to Hryhorchuk, a reduction by this court of that figure to an amount which would be in the financial grasp of the two defendants, would result in an extreme usage of the doctrine which has not been contemplated by our jurisprudence. The court finds that the "inability to pay" rule is functional only when there is a common ground which can be reached between the damages due a claimant and the financial abilities of the defendant. As is in this case, when the award is far beyond the reach of the

defendant, a reduction down to a point attainable by the defendants would violate the rule voiced by the Lacaze case above. For these reasons the inability of the defendants to respond in damages is not considered to be applicable and will not be used by the court to reduce the amount of the award.

Judgment is rendered in favor of Roy Hryhorchuk for his lost wages, pain and suffering and medical expenses against William Clifton and Roy M. Smith, solidarily, and also against State Farm Mutual Automobile Insurance Company and Pennsylvania General Insurance Company, solidarily, up to the limits of their liability.

The fees of the experts who testified are fixed at $50.00 each, taxed as costs and all costs are assessed against the defendants jointly.

A formal judgment in accordance with these views will be signed upon presentation of same.

Lake Charles, Louisiana, December 29, 1978.

/s/ H. WARD FONTENOT
District Judge

APPENDIX G

FOURTEENTH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA
PARISH OF CALCASIEU
ROY HRYHORCHUK
VS. NO. 77 1496
ROY M. SMITH, ET AL

STATE OF LOUISIANA

To State of Louisiana, through William J. Guste, Jr., Attorney General, Baton Rouge, La., E. Baton Rouge Parish of said Parish of Louisiana, defendant—in said suit: You are hereby cited to appear before said Court, for said Parish, and to comply with the demand contained in the petition of Roy Hryhorchuk against you, certified copy of which petition accompanies this citation, or file your answers thereto in writing in the office of the Clerk of Court, at the Court House, in the City of Lake Charles, in said Parish, within fifteen (15) days after the service hereof, under penalty of default. A certified copy of Supplemental & Amended Petition is attached hereto and made a part hereof.

Witness the Honorable Judges of said Court this 12 day of April, A.D., 1981.

Issued and delivered April 22, A.D., 1981.

A TRUE COPY

/s/ CORREZE RAY
Deputy Clerk of Said Court

14TH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA
PARISH OF CALCASIEU
ROY HRYHORCHUK
VS. NO. 77-1496
ROY M. SMITH, ET AL
FILED: APRIL 12, 1977

/s/ JAMES A. MACK
Deputy Clerk

PETITION FOR DAMAGES

The petition of ROY HRYHORCHUK with respect represents that:

1.

Petitioner, ROY HRYHORCHUK, is a citizen and resident of Starks, Calcasieu Parish, Louisiana.

2.

Defendant, ROY M. SMITH, is a citizen and resident of Starks, Calcasieu Parish, Louisiana, who may be served at Starks, Louisiana, at Route 1, Box 111.

3.

Defendant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, is a non-resident insurance corporation, authorized to do and doing business within the State of Louisiana, having as its agent for service of process, the Secretary of State of the State of Louisiana. At the time of the hereinafter described accident, said defendants carried a policy of public automobile liability insurance on the hereinafter mentioned 1971 Dodge automobile, owned by ROY M. SMITH, insuring the owner or any person using said

vehicle with the owner's consent and permission against all claims for personal injuries that might arise out of the ownership, maintenance or use of the aforedescribed vehicle.

4.

Defendant, the CALCASIEU PARISH POLICE JURY, is a political subdivision of the State of Louisiana, and may be served through its President, Neg Beglis, at the office of Rodney Vincent, Calcasieu Parish Police Jury Building.

5.

Defendant, WILLIAM R. CLIFTON, is a citizen and resident of DeQuincy, Calcasieu Parish, Louisiana, who may be served at 404 Perkins Street, DeQuincy, Louisiana.

6.

Defendant, GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORPORATION, LTD., is a non-resident insurance corporation authorized to do and doing business within the State of Louisiana, having as its agent for service of process, the Secretary of State of the State of Louisiana. At the time of the hereinafter described accident, said defendant carried a policy of public automobile liability insurance on a 1976 Dodge automobile, owned by William R. Clifton, insuring the owner, or any person using the vehicle with the owner's consent and permission against all claims for personal injuries that might arise out of the ownership, maintenance, or use of the aforedescribed vehicle.

7.

Defendant, STATE FARM MUTUAL AU-

TOMOBILE INSURANCE COMPANY, is a non-resident insurance corporation, authorized to do and doing business within the State of Louisiana, having as its agent for service of process, the Secretary of State of the State of Louisiana. At the time of the hereinafter described accident, said defendant carried two policies of public automobile liability insurance, one on a 1965 Chevrolet automobile, bearing policy No. 1331-224-D10-18, insuring the owner of said vehicle, Roy Hryhorchuk against all claims for personal injuries arising out of the ownership, maintenance or use of the vehicles, and additionally provided for an "Uninsured or Underinsured Vehicle", and petitioner is entitled to "stacked" the uninsured or underinsured coverage of said policy in regard to this accident.

8.

On or about April 28, 1976, at approximately 10:30 P.M., an unidentified pickup truck was traveling East on Louisiana Highway 12 at approximately the 3 mile post when the driver of the vehicle lost control and ran off of the road into the most westerly end of the bridge and his vehicle came to rest approximately 3 feet off of the paved surface of the road.

9.

After the aforedescribed accident took place, defendant, ROY M. SMITH, a Constable from Starks, Louisiana in the Parish of Calcasieu, came to the scene of the accident and undertook an investigation of the accident, and proceeded to take control of the situation in directing traffic, which was traveling on the highway.

10.

After defendant, ROY M. SMITH came to the scene of the accident, he parked the aforedescribed 1971 Dodge on the paved portion of the highway at the bridge in the Eastbound lane, however, he parked his vehicle facing West in said Eastbound lane totally on the highway.

11.

Petitioner, ROY HRYHORCHUK, was at the scene of the mishap, as he knew the driver of the pickup truck, and was standing behind the 1971 Dodge automobile, which ROY M. SMITH had parked when the following collision took place.

12.

On the aforedescribed, date, time and place, defendant, WILLIAM R. CLIFTON, was driving the aforedescribed 1976 Datsun automobile West on Louisiana 12, approaching the 3 mile marker, and just as he reached the aforementioned bridge, he ran into the front-end of the aforedescribed 1971 Dodge, owned by ROY M. SMITH, which automobile in turn struck petitioner, ROY HRYHORCHUK, who was standing behind the 1971 Dodge, causing the hereinafter described serious injuries to the petitioner.

13.

At the time of the aforedescribed accident, defendant ROY M. SMITH was employed as a Constable in Starks, Louisiana, and was being paid by the defendant, Calcasieu Parish Police Jury, and in any event, he was an employee of said Calcasieu Parish Police Jury, was under their control, and had undertook responsibility

and supervision of the situation at the scene of the accident prior to the accident, involving ROY HRYHORCHUK.

14.

A contributing and proximate cause of the aforedescribed accident was the negligence of the following individuals, not to be exclusive.

ROY M. SMITH:

A. Placing his vehicle on a public highway where he knew or should have known the danger involved;

B. Investigating and in taking the responsibility for investigating a mishap in a careless and imprudent manner;

C. Creating and allowing a dangerous condition to exist when it was unnecessary and there were ample other alternative procedures to be exercised;

D. Failure to exercise good judgment under the existing circumstances;

E. Negligent and irresponsible supervision.

WILLIAM R. CLIFTON:

A. Failure to see what he should have seen;

B. Failure to keep a proper lookout;

C. Failure in general to obey the laws, rules and regulations governing the operation of motor vehicles; [sic]

15.

At the time of the aforedescribed accident, ROY HRYHORCHUK, was 35 years of age, in excellent health and earning his living as a welder in the Livingston Shipyard in Orange, Texas.

16.

As a result of the aforedescribed accident, plaintiff has undergone many periods of hospitalization, and numerous surgical operations, and will continue to have to undergo future hospitalizations, and surgical operations in the future.

17.

As a result of the aforedescribed accident, petitioner has been unable to work and it appears that he will never be able to obtain gainful employment in the future.

18.

Accordingly, plaintiff, ROY HRYHORCHUK itemizes his damages as follows:

A. PAST, PRESENT AND FUTURE MENTAL AND PHYSICAL PAIN, SUFFERING, DISCOMFORT, DISABILITY AND INCONVENIENCE	$1,000,000.00
B. PAST, PRESENT AND FUTURE LOSS OF EARNINGS, AND EARNING CAPACITY ..	$ 500,000.00
C. PAST, PRESENT AND FUTURE MEDICAL AND ATTENDANT EXPENSES	$ 250,000.00
TOTAL	$1,750,000.00

WHEREFORE, Petitioner prays that:

I. Defendants be served with a copy of this petition and duly cited to appear and answer the same;

II. After due proceedings had and trial hereof, there be judgment rendered here in favor of ROY

HRYHORCHUK and against the defendants, ROY M. SMITH, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, CALCASIEU PARISH POLICE JURY, WILLIAM R. CLIFTON, and GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORPORATION, LTD., individually, jointly, severally, and in solido, in the full name of ONE MILLION SEVEN HUNDRED FIFTY THOUSAND AND NO/100 ($1,750,000.00) DOLLARS, together with legal interest thereon from date of judicial demand and all costs of these proceedings.

III. For full, general and equitable relief.

By his attorneys,

/s/ J. CLEM DREWETT
Drewett, Jacques & Thomas
714 Pujo Street
Lake Charles, Louisiana 70602

A True Copy
Lake Charles, Louisiana
April 22, 1982

/s/ CORREZE RAY
Deputy Clerk of Court
Calcasieu Parish, Louisiana

14TH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA
PARISH OF CALCASIEU
ROY HRYHORCHUK
VS. No. 77-149
ROY M. SMITH, ET AL
FILED: JULY 28, 1977

/s/ A. KLVOR
Deputy Clerk

SUPPLEMENTAL AND AMENDED PETITION

NOW INTO COURT, comes ROY HRYHORCHUK, to add additional parties hereto and to amend and supplement his original petition who with respect represents that:

That additional parties are to be added as defendants and additional allegations made to amend and supplement the petition and petitioner wishes to add allegation 3a.

3a.

Defendant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, at the time of the hereinafter described accident, carried an additional policy of public automobile liability insurance on a 1968 Rambler owned by ROY M. SMITH, insuring the owner or any person using said vehicle with the owner's consent and permission against all claims for personal injuries that might arise out of the ownership, maintenance or use of the aforedescribed vehicle, and said policy of insurance represents excess coverage in favor of ROY M. SMITH.

Petitioner wishes to add allegation 4a., and an additional party defendant.

4a.

Defendant, UNITED STATES FIDELITY & GUARANTY COMPANY, is a non-resident insurance corporation authorized to do and doing business within the State of Louisiana, having as its agent for service of legal process the Secretary of State of the State of Louisiana. At the time of the hereinafter described accident, defendant carried a policy of general liability insurance con the Calcasieu Parish Policy Jury, insuring the Calcasieu Parish Police Jury, its agents, servants, and employees against all claims for personal injuries that they might be liable for.

Petitioner wishes to add additional parties defendant in the following allegations:

7a.

Defendant, THE STATE OF LOUISIANA, through its agency, the DEPARTMENT OF PUBLIC HIGHWAYS, is a defendant herein, and may be served through the Director of the Department of Public Highways, Baton Rouge, Louisiana.

7b.

THE STATE OF LOUISIANA, through its agency, the DEPARTMENT OF PUBLIC SAFETY, is a defendant who may be served through the Director of the Department of Public Safety, Baton Rouge, Louisiana.

7c.

THE CALCASIEU PARISH SHERIFF'S DE-

PARTMENT, is a defendant, who may be served through the Sheriff of Calcasieu Parish, Henry A. Reid, Jr., Calcasieu Parish Sheriff's Department, Lake Charles, Louisiana.

7d.

Defendant, NORTH RIVER INSURANCE COMPANY, is a non-resident insurance corporation, authorized to do and doing business within the State of Louisiana, having as its agent for service of process, the Secretary of State of the State of Louisiana. At the time of the hereinafter described accident, said defendant carried a policy of general liability insurance on the Calcasieu Parish Sheriff's Department, insuring them, their agents, servants, and employees, against all claims for personal injuries that might arise out of the Calcasieu Parish Sheriff's Department.

Petitioner desires and is entitled to change allegation No. 13 to read as follows:

13.

At the time of the aforedescribed accident, defendant, ROY M. SMITH, was a Constable in Ward 5, Starks, Louisiana, and was employed and being paid by the defendant, CALCASIEU PARISH POLICE JURY, and under their control and in any event, he was an employee of the said CALCASIEU PARISH POLICE JURY, and at the time of said accident, was acting as an agent and employee for the CALCASIEU PARISH SHERIFF'S DEPARTMENT, the LOUISIANA DEPARTMENT OF PUBLIC SAFETY and the LOUISIANA DEPARTMENT OF PUBLIC HIGHWAYS, and was under their direction and had un-

dertook responsibility and supervision of the situation at the scene of the accident prior to the accident, involving ROY HRYHORCHUK.

Petitioner adds allegation No. 19 to read as follows:

19.

Petitioner files herewith Supplemental and Amended Petition, interrogatories to certain party defendants, as well as Motion for Production of Documents to certain defendants.

WHEREFORE, Petitioner prays that:

I. The defendants be served with a copy of this petition and duly cited to appear and answer the same;

II. That after due proceedings had and trial hereof, there be judgment rendered herein in favor of ROY HRYHORCHUK and against the defendants, ROY M. SMITH, STATE FARM MUTUAL INSURANCE COMPANY, CALCASIEU PARISH POLICE JURY, UNITED STATES FIDELITY AND GUARANTY COMPANY, WILLIAM R. CLIFTON, GENERAL ACCIDENT FIRE & LIFE INSURANCE COMPANY, STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF PUBLIC SAFETY, STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF PUBLIC HIGHWAYS, CALCASIEU PARISH SHERIFF'S DEPARTMENT and NORTH RIVER INSURANCE COMPANY, individually, jointly, severally, and in solido, in the full sum of ONE MILLION SEVEN HUNDRED FIFTY THOUSAND AND NO/100 ($1,750,000.00) DOLLARS, together with legal interest thereon from date of judicial demand until paid and for all costs of these proceedings;

III. The additional defendants named herein be served with a copy of the original petition filed herein;

IV. All of the allegations of the original petition be reiterated and reurged in this Amended and Supplemental Petition;

V. The Interrogatories and Motion for Production of Documents filed herewith be served on the defendants;

VI. For full, general and equitable relief.

By his attorneys,

/s/ J. CLEM DREWETT
Drewett, Jacques & Thomas
714 Pujo Street
Lake Charles, Louisiana 70602

ORDER

LET the above and foregoing Amended and Supplemental Petition be filed:

THUS DONE AND SIGNED in Chambers, at Lake Charles, Louisiana, this twenty-seventh day of July, 1977.

/s/EARL E. VERON
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have sent a copy of the foregoing Supplemental and Amended Petition to the following Attorneys of Record for the original defendants, via U.S. mails, postage prepaid;

Mr. Fred L. Cappel
Raggio, Farrar, Cappel & Chozen
P. O. Box 820
Lake Charles, Louisiana
Attorney for Calcasieu Parish Police Jury

Mr. Fred H. Sievert, Jr.
Stockwell, Sievert, Viccellio & Shaddock
P. O. Box 2900
Lake Charles, Louisiana
Attorneys for State Farm and Roy M. Smith

Mr. H. O. Lestage, III
Hall, Lestage & Lestage
P. O. Box 151
DeRidder, Louisiana
Attorney for State Farm
Automobile Insurance Company

Mr. Jimmy Nieset
Plauche, Smith, Hebert & Nieset
P. O. Drawer 1705
Lake Charles, Louisiana
Attorneys for General Accident
Fire & Life Assurance Corp.

A True Copy
Lake Charles, Louisiana
April 22, 1981

/s/ CORREZE RAY
Deputy Clerk of Court
Calcasieu Parish, Louisiana

FOURTEENTH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA
PARISH OF CALCASIEU
ROY HRYHORCHUK
VS. NO. 77-1496
ROY M. SMITH, ET AL.,
(consolidated with #78-4318
ROY HRYHORCHUK V. CALCASIEU PARISH
POLICE JURY, ET AL)

STATE OF LOUISIANA

To STATE OF LOUISIANA, through Attorney General's Office, Baton Rouge, E. Baton Rouge Parish, Louisiana, defendant—in said suit: You are hereby cited to appear before said Court, for said Parish, and to comply with the demand contained in the Supplemental and Amended Petition of: ROY HRYHORCHUK against you, certified copy of which petition accompanies this citation, or file your answers thereto in writing in the office of the Clerk of Court, at the Court House, in the City of Lake Charles, in said Parish, within fifteen (15) days after the service hereof, under penalty of default.

Witness the Honorable Judges of said Court this twenty-eighth day of July, A.D., 1977.

Issued and delivered May 7, A.D., 1981.

A True Copy
May 12, 1981

/s/ PAMELA C. FAIRCHILD
Deputy Clerk of Said Court

14TH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA
PARISH OF CALCASIEU

ROY HRYHORCHUK
VS. NO. 77-1496
ROY M. SMITH, ET AL

FILED: JULY 28, 1977

/s/ A. KLOOR
Deputy Clerk

SUPPLEMENTAL AND AMENDED PETITION

NOW INTO COURT, comes ROY HRYHORCHUK, to add additional parties hereto and to amend and supplement his original petition who with respect represents that:

That additional parties are to be added as defendants and additional allegations made to amend and supplement the petition and petitioner wishes to add allegation 3a.

3a.

Defendant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, at the time of the hereinafter described accident, carried an additional policy of public automobile liability insurance on a 1968 Rambler owned by ROY M. SMITH, insuring the owner or any person using said vehicle with the owner's consent and permission against all claims for personal injuries that might arise out of the ownership, maintenance or use of the aforedescribed vehicle, and said policy of insurance represents excess coverage in favor of ROY M. SMITH.

Petitioner wishes to add allegation 4a., and an additional party defendant.

4a.

Defendant, UNITED STATES FIDELITY & GUARANTY COMPANY, is a non-resident insurance corporation authorized to do and doing business within the State of Louisiana, having as its agent for service of legal process the Secretary of State of the State of Louisiana. At the time of the hereinafter described accident, defendant carried a policy of general liability insurance con the Calcasieu Parish Police, insuring the Calcasieu Parish Police Jury, its agents, servants, and employees against all claims for personal injuries that they might be liable for.

Petitioner wishes to add additional parties defendant in the following allegations:

7a.

Defendant, THE STATE OF LOUISIANA, through its agency, the DEPARTMENT OF PUBLIC HIGHWAYS, is a defendant herein, and may be served through the Director of the Department of Public Highways, Baton Rouge, Louisiana.

7b.

THE STATE OF LOUISIANA, through its agency, the DEPARTMENT OF PUBLIC SAFETY, is a defendant who may be served through the Director of the Department of Public Safety, Baton Rouge, Louisiana.

7c.

THE CALCASIEU PARISH SHERIFF'S DE-

PARTMENT, is a defendant, who may be served through the Sheriff of Calcasieu Parish, Henry A. Reid, Jr., Calcasieu Parish Sheriff's Department, Lake Charles, Louisiana.

7d.

Defendant, NORTH RIVER INSURANCE COMPANY, is a non-resident insurance corporation, authorized to do and doing business within the state of Louisiana, having as its agent for service of process, the Secretary of State of the State of Louisiana. At the time of the hereinafter described accident, said defendant carried a policy of general liability insurance on the Calcasieu Parish Sheriff's Department, insuring them, their agents, servants, and employees, against all claims for personal injuries that might arise out of the Calcasieu Parish Sheriff's Department.

Petitioner desires and is entitled to change allegation No. 13 to read as follows:

13.

At the time of the aforedescribed accident, defendant, ROY M. SMITH, was a Constable in Ward 5, Starks, Louisiana, and was employed and being paid by the defendant, CALCASIEU PARISH POLICE JURY, and under their control and in any event, he was an employee of the said CALCASIEU PARISH POLICE JURY, and at the time of said accident, was acting as an agent and employee for the CALCASIEU PARISH SHERIFF'S DEPARTMENT, the LOUISIANA DEPARTMENT OF PUBLIC SAFETY and the LOUISIANA DEPARTMENT OF PUBLIC HIGHWAYS, and was under their direction and had un-

dertook responsibility and supervision of the situation at the scene of the accident prior to the accident, involving ROY HRYHORCHUK.

Petitioner adds allegation No. 19 to read as follows:

19.

Petitioner files herewith Supplemental and Amended Petition, interrogatories to certain party defendants, as well as Motion for Production of Documents to certain defendants.

WHEREFORE, Petitioner prays that:

I. The defendants be served with a copy of this petition and duly cited to appear and answer the same;

II. That after due proceedings had and trial hereof, there be judgement rendered herein in favor of ROY HRYHORCHUK and against the defendants, ROY M. SMITH, STATE FARM MUTUAL INSURANCE COMPANY, CALCASIEU PARISH POLICE JURY, UNITED STATES FIDELITY AND GUARANTY COMPANY, WILLIAM R. CLIFTON, GENERAL ACCIDENT FIRE & LIFE INSURANCE COMPANY, STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF PUBLIC SAFETY, STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF PUBLIC HIGHWAYS, CALCASIEU PARISH SHERIFF'S DEPARTMENT and NORTH RIVER INSURANCE COMPANY, individually, jointly, severally, and in solido, in the full sum of ONE MILLION SEVEN HUNDRED FIFTY THOUSAND AND NO/100 ($1,750,000.00) DOLLARS, together with legal interest thereon from date of judicial demand until paid and for all costs of these proceedings;

III. The additional defendants named herein be served with a copy of the original petition filed herein;

IV. All of the allegations of the original petition be reiterated and reurged in this Amended and Supplemental Petition;

V. The Interrogatories and Motion for Production of Documents filed herewith be served on the defendants;

VI. For full, general and equitable relief.

By his attorneys,

/s/ J. CLEM DREWETT
Drewett, Jacques & Thomas
714 Pujo Street
Lake Charles, Louisiana 70602

ORDER

LET the above and foregoing Amended and Supplemental Petition be filed.

THUS DONE AND SIGNED in Chambers, at Lake Charles, Louisiana, this twenty-seventh day of July, 1977.

/s/EARL E. VERON
District Judge

A True Copy
Lake Charles, Louisiana
May 7, 1981

/s/PAMELA C. FAIRCHILD
Deputy Clerk of Court
Calcasieu Parish, Louisiana

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have sent a copy of the foregoing Supplemental and Amended Petition to the following Attorneys of Record for the original defendants; via U.S. mails, postage prepaid:

Mr. Fred L. Cappel
Raggio, Farrar, Cappel & Chozen
P. O. Box 820
Lake Charles, Louisiana
Attorney for Calcasieu Parish
Police Jury

Mr. Fred H. Sievert, Jr.
Stockwell, Sievert, Viccellio
& Shaddock
P. O. Box 2900
Lake Charles, Louisiana
Attorneys for State Farm and
Roy M. Smith

Mr. H. O. Lestage, III
Hall, Lestage & Lestage
P. O. Box 151
DeRidder, Louisiana
Attorney for State Farm
Automobile Insurance Company

Mr. Jimmy Nieset
Plauche, Smith, Hebert & Nieset
P. O. Drawer 1705
Lake Charles, Louisiana
Attorneys for General Accident
Fire & Life Assurance Corp.

FOURTEENTH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA
PARISH OF CALCASIEU

ROY HRYHORCHUK
VS. NO. 78-4318
CALCASIEU PARISH POLICE JURY, ET AL

STATE OF LOUISIANA

To State of Louisiana, through William J. Guste, Jr., Attorney General, Baton Rouge, La., E. Baton Rouge Parish of said parish of Calcasieu, Louisiana, defendant—in said suit: You are hereby cited to appear before said Court, for said Parish, and to comply with the demand contained in the petition of Roy Hryhorchuk against you, certified copy of which petition accompanies this citation, or file your answers thereto in writing in the office of the Clerk of Court, at the Court House, in the City of Lake Charles, in said Parish, within fifteen (15) days after the service hereof, under penalty of default.

Witness the Honorable Judges of said Court this third day of August A.D., 1981.

Issued and delivered August 22, A.D., 1981.

A True Copy

/s/ CORREZE RAY
Deputy Clerk of Said Court

14TH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA
PARISH OF CALCASIEU

ROY HRYHOPCHUK
VS. No. 78-4318
CALCASIEU PARISH POLICE
JURY, ET AL

FILED: AUGUST 31, 1978

/s/ JAMES A MACK
Deputy Clerk

PETITION FOR DECLARATORY JUDGMENT

The petition of ROY HRYHORCHUK, a resident of the lawful age of majority of the Parish of Calcasieu, with respect represents that:

1.

Made defendants herein are, CALCASIEU PARISH POLICE JURY, who may be served through its President, Neg Beglis, a Political Subdivision of the State of Louisiana, domiciled in Calcasieu Parish; HOUSTON GENERAL INSURANCE COMPANY, authorized to do and doing business within the State of Louisiana, and TRAVELERS INSURANCE COMPANY, a foreign insurance corporation, authorized to do and doing business within the State of Louisiana, both of which may be served through the Secretary of State of the State of Louisiana.

2.

That the petitioner was injured in an automobile accident, which occurred on or about April 28, 1976, in the Parish of Calcasieu, State of Louisiana, and which it

has been alleged that plaintiff was injured as a result of the negligence of one ROY M. SMITH, who is alleged to have been an agent, servant, employee and/or the DEPARTMENT OF PUBLIC SAFETY OF THE STATE OF LOUISIANA.

3.

That prior to the accident, the defendants herein had issued certain policies of general comprehensive liability insurance and public automobile liability insurance, which petitioner alleges insure and/or cover ROY M. SMITH and/or the CALCASIEU PARISH POLICE JURY and/or the DEPARTMENT OF PUBLIC SAFETY, under the terms of said policies, as being an agent, servant, employee, and/or representative of the CALCASIEU PARISH POLICE JURY, and/or the DEPARTMENT OF PUBLIC SAFETY, STATE OF LOUISIANA, or substitute employee.

4.

The petitioner was not informed of the insurance policies issued by the defendant, the TRAVELERS INSURANCE COMPANY, and HOUSTON GENERAL INSURANCE COMPANY, in favor of the CALCASIEU PARISH POLICE JURY until just recently and accordingly desires to have the defendants produce the policy at the trial of this matter.

5.

Petitioner does not have the insurance policy issued by the defendant TRAVELERS INSURANCE COMPANY in favor of the DEPARTMENT OF PUBLIC SAFETY, and accordingly desires to have the defendant produce this policy at the trial of this matter.

6.

That your petitioner relied upon representations made by the CALCASIEU PARISH POLICE JURY that it did not have any liability insurance other than that afforded by UNITED STATES FIDELITY & GUARANTY COMPANY, when in fact it is learned that the CALCASIEU PARISH POLICE JURY now have other insurance, which may afford coverage to ROY M. SMITH, on the date of the above accident.

7.

That petitioner has relied to his detriment upon the representations made by the CALCASIEU PARISH POLICE JURY, concerning insurance coverage as of the date of April 28, 1976.

8.

Petitioner did not discover that the said representations of the CALCASIEU PARISH POLICE JURY were misleading and did not learn the facts consealed from petitioner until May 30, 1978, in the course of trying a case against the defendant CALCASIEU PARISH POLICE JURY and other defendants.

9.

The petitioner alleges that ROY M. SMITH was an insured under the terms of the policies issued by HOUSTON GENERAL INSURANCE COMPANY to the CALCASIEU PARISH POLICE JURY and also insured under the terms of the policies issued by TRAVELERS INSURANCE COMPANY to the CALCASIEU PARISH POLICE JURY and/or the DEPARTMENT OF PUBLIC SAFETY, STATE OF

LOUISIANA, and that said policies were in full force and effect on the date of April 28, 1976.

10.

Petitioner desires that a declaratory judgment be issued herein, declaring that ROY M. SMITH was an insured under the terms of the policies issued by HOUSTON GENERAL INSURANCE COMPANY to the CALCASIEU PARISH POLICE JURY and/or under the terms of the policies issued by TRAVELERS INSURANCE COMPANY to the CALCASIEU PARISH POLICE JURY and/or the DEPARTMENT OF PUBLIC SAFETY, STATE OF LOUISIANA.

WHEREFORE, petitioner prays that defendants be duly cited and served herein and directed to make answer thereto and after all due proceedings had and legal delays having elapsed, that there be judgment herein in favor of ROY HRYHORCHUK, and against the defendants, CALCASIEU PARISH POLICE JURY, HOUSTON GENERAL INSURANCE COMPANY, and TRAVELERS INSURANCE COMPANY, decreeing that the said ROY M. SMITH was an insured under the terms of the policies issued by the defendants, HOUSTON GENERAL INSURANCE COMPANY and TRAVELERS INSURANCE COMPANY, on April 28, 1976, and that there be judgment herein fixing and determining the rights, status and other legal relations existing between and among the parties to this litigation and that the defendants be ordered to pay all costs of these proceedings.

By his attorneys,

/s/ J. CLEM DREWETT
Drewett, Jacques & Thomas
714 Pujo Street - P. O. Box 1883
Lake Charles, Louisiana 70602

A True Copy
Lake Charles, Louisiana
April 22, 1981

/s/ CORREZE RAY
Deputy Clerk of Court
Calcasieu Parish, Louisiana

APPENDIX H

Supreme Court of Louisiana

No. 82-C-1363

(Third Circuit Nos. 8733 and 8734—consolidated)
(District Court Nos. 78-4318—consolidated)

ROY HRYHORCHUK
Defendant-Appellee,

VERSUS

ROY M. SMITH, ET AL
Plaintiff-Appellants.

C/W

ROY HRYHORCHUK
Defendant-Appellee,

VERSUS

CALCASIEU PARISH POLICE JURY ET AL
Plaintiffs-Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that defendant-appellant, State of Louisiana, hereby appeals from the judgment entered on June 21, 1982, of the Louisiana Supreme Court (Docket Number 82-C-1363) denying defendant-appellant's petition for writ of certiorari and review to the Louisiana Court of Appeal, Third Circuit, Parish of Calcasieu, (Docket Numbers 8733 and 8734—consolidated), insofar as said denial upholds the judgments of the Louisiana Court of Appeal, Third Circuit, in favor of plaintiff-appellee, Roy Hryhorchuk, against

defendant-appellant State of Louisiana in the amount of $627,389.24, plus interest and costs, and in favor of Travelers Insurance Company exonerating said company from liability herein, all of which, it is submitted, violates the Fourteenth Amendment to the Constitution of the United States of America. No application for rehearing is permitted by Louisiana law. This appeal is taken pursuant to 28 U.S.C. 1257 (2).

Notice is also given that, under the rules, the Supreme Court of the United States of America may, additionally, choose to summarily vacate or reverse the state court decision under 28 U.S.C. 1257(3) and that defendant-appellant State of Louisiana may, additionally or alternatively, request same.

Respectfully submitted:

WILLIAM J. GUSTE, JR.
Attorney General
/s/ THOMAS S. HALLIGAN
Assistant Attorney General
/s/ CHARLES L. PATIN, JR.
Assistant Attorney General
Chief, Civil Division
DEPARTMENT OF JUSTICE
Post Office Box 44005
Baton Rouge, Louisiana 70804
Telephone (504) 342-7013

CERTIFICATE OF SERVICE

I certify that a copy of the above notice of appeal to the United States Supreme Court has been served on all parties required to be served by depositing same in a United States mailbox, with first class postage, prepaid, addressed to counsel of record of all parties required to be service at their post office addressed on the sixteenth day of September, 1982. Service has been made upon:

Fred H. Sievert, Jr.
Post Office Box 2900
Lake Charles, Louisiana 70602

Reid K. Hebert
Post Office Drawer 1705
Lake Charles, Louisiana 70602

William J. Doran, Jr., and
William R. Kivett
704 South Foster Drive
Baton Rouge, Louisiana 70806

John K. Van Norman, III
Post Office Box 1746
Lake Charles, Louisiana 70602

H. O. Lestage, III
Post Office Box 151
DeRidder, Louisiana 70634

Robert H. Marve and
Woodrow W. Wyatt
Post Office Box 44245, Capital Station
Baton Rouge, Louisiana 70804

Edmund E. Woodley
Post Office Drawer EE
Lake Charles, Louisiana 70602

Robert W. Thomas
522 Clarence
Lake Charles, Louisiana 70601

Court of Appeal
Third Circuit
c/o Honorable Kenneth deBlanc, Clerk
State of Louisiana
Calcasieu Parish Courthouse Annex
Lake Charles, Louisiana 70601

Fourteenth Judicial District Court
Parish of Calcasieu
c/o Honorable Acton Hillebrandt
Clerk of Court
Post Office Box 1030
Lake Charles, Louisiana 70602

Supreme Court of Louisiana
c/o Honorable Frans J. Labranche, Jr.
Supreme Court Building
301 Loyola Avenue
New Orleans, Louisiana 70112

Baton Rouge, Louisiana, this sixteenth day of September, 1982.

/s/ THOMAS S. HALLIGAN

APPENDIX I

La. Const., Art. 4, §5(A)

§5. Governor; Powers and Duties

Section 5. (A) Executive Authority. The governor shall be the chief executive officer of the state. He shall faithfully support the constitution and laws of the state and of the United States and shall see that the laws are faithfully executed.

La. Const., Art. 4 §8

§8. Attorney General; Powers and Duties

Section 8. There shall be a Department of Justice, headed by the attorney general, who shall be the chief legal officer of the state. The attorney general shall be elected for a term of four years at the state general election. The assistant attorneys general shall be appointed by the attorney general to serve at his pleasure.

As necessary for the assertion or protection of any right or interest of the state, the attorney general shall have authority (1) to institute, prosecute, or intervene in any civil action or proceeding; (2) upon the written request of a district attorney, to advise and assist in the prosecution of any criminal case; and (3) for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, (a) to institute, prosecute, or intervene in any criminal action or proceeding, or (b) to supersede any attorney representing the state in any civil or criminal action.

The attorney general shall exercise other pow-

ers and perform other duties authorized by this constitution or by law.

La. Const., Art. 5 §5

§5. Supreme Court; Jurisdiction; Rule-Making Power; Assignment of Judges

Section 5. (A) Supervisory Jurisdiction; Rule-Making Power; Assignment of Judges. The supreme court has general supervisory jurisdiction over all other courts. It may establish procedural and administrative rules not in conflict with law and may assign a sitting or retired judge to any court.

(B) Original Jurisdiction. The supreme court has exclusive original jurisdiction of disciplinary proceedings against a member of the bar.

(C) Scope of Review. Except as otherwise provided by this constitution, the jurisdiction of the supreme court in civil cases extends to both law and facts. In criminal matters, its appellate jurisdiction extends only to questions of law.

(D) Appellate Jurisdiction. In addition to other appeals provided by this constitution, a case shall be appealable to the supreme court if (1) a law or ordinance has been declared unconstitutional; (2) the defendant has been convicted of a felony or a fine exceeding five hundred dollars or imprisonment exceeding six months actually has been imposed.

(E) Other Criminal Cases; Review. In all criminal cases not provided in Paragraph (D) (2) of this Section, a defendant has a right of appeal or review, as provided by law.

(F) Appellate Jurisdiction; Civil Cases; Extent. Subject to the provisions in Paragraph (C), the supreme court has appellate jurisdiction over all issues involved in a civil action properly before it.

La. Const., Art. 5 §10

§10. Courts of Appeal; Jurisdiction

Section 10. (A) Jurisdiction. Except in cases appealable to the supreme court and except as otherwise provided by this constitution, a court of appeal has appellate jurisdiction of all (1) civil matters decided within its circuit and (2) matters appealed from family and juvenile courts, except criminal prosecutions of persons other than juveniles. It has supervisory jurisdiction over cases in which an appeal would lie to it.

(B) Scope of Review. Except as limited to questions of law by this constitution, or as provided by law in the review of administrative agency determinations, appellate jurisdiction of a court of appeal extends to law and facts.

La. Const., Art. 5, §16

§16. District Courts; Jurisdiction

Section 16. (A) Original Jurisdiction. Except as otherwise authorized by this constitution, a district court shall have original jurisdiction of all civil and criminal matters. It shall have exclusive original jurisdiction of felony cases and of cases involving title to immovable property; the right to office or other public position; civil or political rights; probate and succession matters; the state, a political corpora-

tion, or political subdivisions, or a succession, as a defendant; and the appointment of receivers or liquidators for corporations or partnerships.

(B) Appellate Jurisdiction. A district court shall have appellate jurisdiction as provided by law.

La. Const., Art. 12, §10

§10. Suits Against the State

Section 10. (A) No Immunity in Contract and Tort. Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.

(B) Waiver in Other Suits. The legislature may authorize other suits against the state, a state agency, or a political subdivision. A measure authorizing suit shall waive immunity from suit and liability.

(C) Procedure; Judgments. The legislature shall provide a procedure for suits against the state, a state agency, or a political subdivision. It shall provide for the effect of a judgment, but no public property or public funds shall be subject to seizure. No judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated therefor by the legislature or by the political subdivision against which judgment is rendered.

La. C.C.P., Art. 1265

Art. 1265. Political entity; public officer

Service of citation or other process on any polit-

ical subdivision, public corporation, or state, parochial or municipal board or commission is made at its office by personal service upon the chief executive officer thereof, or in his absence upon any employee thereof of suitable age and discretion. A public officer, sued as such, may be served at his office either personally, or in his absence, by service upon any of his employees of suitable age and discretion.

If the political entity or public officer has no established office, then service may be made at any place where the chief executive officer of the political entity or the public officer to be served may be found.

La. C.C.P., Art. 1635

Art. 1635. Exceptions unnecessary

Formal exceptions to rulings or orders of the court are unnecessary. For all purposes it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

La. C.C.P., Art. 1810(B)

B. In an action tried by the court without a jury, after the plaintiff has completed the presentation of his evidence, any party, without waiving his right to offer evidence in the event the motion is not

granted, may move for a dismissal of the action as to him on the ground that upon the facts and law, the plaintiff has shown no right to relief. The court may then determine the facts and render judgment against the plaintiff and in favor of the moving party or may decline to render any judgment until the close of all the evidence. Added by Acts 1977, No. 699, §1. Amended by Acts 1978, No. 156, §1.

La. C.C.P., Art. 2128

Art. 2128. Same; determination of content

The form and content of the record on appeal shall be in accordance with the rules of the appellate court, except as provided in the constitution. However, within three days, exclusive of holidays, after taking the appeal the appellant may designate in writing filed with the trial court such portions of the record which he desires to constitute the record on appeal. Within five days, exclusive of holidays, after service of a copy of this designation on the other party, that party may also designate in writing filed with the trial court such other portions of the record as he considers necessary. In such cases the clerk shall prepare the record on appeal as so directed, but a party or the trial court may cause to be filed thereafter any omitted portion of the record as a supplemental record. When no designation is made, the record shall be a transcript of all the proceedings as well as all documents filed in the trial court.

La. C.C.P., Art. 2129

Art. 2129. Assignment of errors unnecessary; exception

An assignment of errors is not necessary in any appeal. Where the appellant designates only portions of the record as the record on appeal, he must serve with his designation a concise statement of the points on which he intends to rely, and the appeal shall be limited to those points.

La. R.C.C., Art. 453

Art. 453. Private things

Private things are owned by individuals, other private persons, and by the state or its political subdivisions in their capacity as private persons.

La. R.C.C., Art. 2286

Art. 2286. Res judicata, essential elements

Art. 2286. The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality.

La. R.C.C., Art. 2320

Art. 2320. Acts of servants, students or apprentices

Art. 2320. Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed.

Teachers and artisans are answerable for the damage caused by their scholars or apprentices, while under their superintendence.

In the above cases, responsibility only attaches, when the masters or employers, teachers and artisans, might have prevented the act which caused the damage, and have not done it.

La. R.S. 13:5107

§5107. Service of citations and process

In all suits filed against the state of Louisiana or a state agency or political subdivision of the state, citation and service may be obtained by citation and service on the attorney general of Louisiana, or any employee in his office above the age of sixteen years, or on a district attorney or a city attorney or any other proper officer or person, depending upon the identity of the named defendant and in accordance with the laws of this state, and on the department, board, commission, or agency head or person, depending upon the identity of the named defendant and in accordance with the laws of this state, and on the department, board, commission, or agency head or person, depending upon the identity of the named defendant and the identity of the named board, commission, department, agency, or officer through which or through whom suit is to be filed against.

La. R.S. 42:1

§1. Public office defined

As used in this title, the term "public office" means any state, district, parish or municipal office, elective or appointive, or any position as member on a board or commission elective or appointive, when the office or position is established by the constitution or laws of this state.

"Public officer" is any person holding a public office in this state.